Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHRISTOPHER T. LIZZI,
PETITIONER

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES A FEDERAL JUDGMENT DISMISSING AN ACTION FOR LACK OF SUBJECT-MATTER JURISDICTION HAVE CLAIM-PRECLUSIVE EFFECT?

II. DOES A FEDERAL JUDGMENT DISMISSING AN ACTION BASED ON ELEVENTH-AMENDMENT IMMUNITY HAVE CLAIM-PRECLUSIVE EFFECT?

LIST OF PARTIES

The Petitioner is Christopher T. Lizzi.

The Respondents are Washington Metropolitan Area Transit Authority ("WMATA"), Robert Alexander, Charles Thomas, Philip Wallace, Al McCoy, Anthony Johnson, and Mary O'Donnell.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher T. Lizzi respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland entered in this proceeding on December 9, 2004 so that the important issues of federalism and fundamental fairness presented herein may be addressed.

OPINIONS BELOW

The Appendix includes the following:

1. Opinion of the Court of Appeals of Maryland in *Lizzi v. WMATA*, et al., 384 Md. 199, 862 A.2d 1017 (2004). App. 1a-18a.

2. Opinion of the Court of Special Appeals of Maryland in *Lizzi v. WMATA, et al.*, 156 Md. App. 1, 845 A.2d 60 (2003). App. 19a-41a.

3. Transcript of the January 4, 2002 hearing before the Circuit Court for Prince George's County, Maryland in *Lizzi v. WMATA, et al.* (Case No. CAL99-19586). App. 42a-56a.

4. Transcript of the March 29, 2002 hearing before the Circuit Court for Prince George's County, Maryland in *Lizzi v. WMATA, et al.* (Case No. CAL99-19586). App. 57a-75a.

5. Opinion of the United States Court of Appeals for the Fourth Circuit in *Lizzi v. Alexander, et al.*, 255 F.3d 128 (4th Cir. 2001). App. 76a-94a.

6. Order of the Court of Appeals of Maryland denying motion for reconsideration. 95a.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals of Maryland affirming the decision of the Court of Special Appeals of Maryland was entered on December 9, 2004. App. 1a-18a. On January 11, 2005, the Court of Appeals of Maryland denied Petitioner's Motion For Reconsideration. App. 95a. This petition for a writ of certiorari is filed within ninety (90) days of that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

On June 20, 2001, the United States Court of Appeals for the Fourth Circuit held, in *Lizzi v. Alexander, et al.*, 255 F.3d 128 (4th Cir. 2001), that the Eleventh Amendment to the United States Constitution barred a federal action in which Petitioner alleged that Respondents had terminated his employment with WMATA in violation of the Family and Medical Leave Act of 1993 (the "FMLA"), and that the federal action should therefore be dismissed for *lack of subject matter jurisdiction*. It summarized its opinion as follows (*id.* at 138):

> The WMATA compact does not waive the agency's Eleventh Amendment immunity from suit. And the FMLA does not validly abrogate a state's immunity. Consequently, Lizzi's claims against WMATA must be dismissed for lack of subject matter jurisdiction. Similarly, Lizzi's claims against the individual supervisors at WMATA must be dismissed as well because these claims were in reality an action against the agency itself. The FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state. For the foregoing reasons, the judgment of the district court

is affirmed in part, reversed in part and remanded with directions to dismiss it.

In addition to his federal action, Petitioner had filed this action in the Circuit Court for Prince George's County, Maryland (hereafter the "circuit court"), alleging, based on the same facts as the federal action, not only the FMLA claim asserted therein, but also claims for breach of contract and violation of the Maryland Declaration of Rights.

The circuit court decided that, under Maryland common law *res judicata* principles, the federal judgment precludes this action.

On appeal, the Court of Special Appeals of Maryland, that State's intermediate appellate court, declined to address the *res judicata* issue, holding instead that sovereign immunity bars this action.

On certiorari, the Court of Appeals of Maryland (hereafter the "Court of Appeals"), relying upon Maryland common law, held that the federal judgment bars this action.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals' Application Of Maryland Common Law To The Claim-Preclusion Issue Conflicts With The Principle That Federal Law Governs The Claim-Preclusive Effect Of Federal Judgments And Threatens The Coherence Of The Federal Judicial System By Allowing States To Determine The Effect Of Federal Judgments.

In a series of cases, this Court has established the principle that federal law governs the claim-preclusive effect of federal judgments. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001); *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938); *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 290-91 (1906); *Deposit Bk. v. Frankfort*, 1919 U.S. 499, 514-15 (1903).

Lower federal courts have consistently followed this rule. *Perez v. Volvo Car Corp.*, 247 F.3d 303, 311 (1st Cir. 2001); *Kaplan v. First Options*, 143 F.3d 807, 814-15 (3rd Cir. 1998); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179-80 (4th Cir. 1989); *Jackson v. FIE Corp.*, 302 F.3d 515, 528 n. 58 (5th Cir. 2002); *Remus Joint Venture v. McAnally*, 116 F.3d 180, 186 (6th Cir. 1997); *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 296 F.3d 624, 628 (7th Cir. 2002); *Friez v. First Am. Bank & Trust*, 324 F.3d 580, 582 (8th Cir. 2003); *Tahoe-Sierra Pres. Council, Inc.v. Tahoe Reg'l Planning Agency*, 322 F.3d

1064, 1077 n. 10 (9th Cir. 2003); *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999); *Empire Fire & Marine Ins. Co. v. J. Transport, Inc.*, 880 F.2d 1291, 1293 n. 2 (11th Cir. 1989); *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1495 (D.C. Cir. 1983).

Likewise, various state appellate courts have endorsed it. *Marrie v. Int'l Local 717*, 2002 Ohio 3148, at *15 (Ohio Ct. App. 2002); *Equity Resources Mgmt., Inc. v. Vinson*, 723 So. 2d 634, 639 (Ala. Supreme Ct. 1999)(Cook, concurring); *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 N.J. 398, 411-12, 591 A.2d 592, 598 (N.J. Supreme Ct. 1991); *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 281 (Tex. Supreme Ct. 1996).

In stark contrast, the Court of Appeals in this case disregarded federal law in determining the claim-preclusive effect of the federal judgment that dismissed Petitioner's federal action for lack of subject-matter jurisdiction. After beginning its claim-preclusion analysis by noting the definition of *res judicata* set forth in Black's Law Dictionary, *id.* at 8a (quoting *Black's Law Dictionary* 1336-37 (8th ed. 2004), the Court of Appeals applied Maryland common law to the claim-preclusion issue. *Id.* (citing *Alvey v. Alvey*, 225 Md. 386, 390, 171 A.2d 92, 94 (1961), *Mackall v. Zayre Corp.*, 293 Md. 221, 228, 443 A.2d 98, 102 (1982), and *Colandrea v. Wilde Lake Community Ass'n*, 361 Md. 371, 391, 761 A.2d 899, 909 (2000), and quoting the Maryland common law *res judicata* principles set forth therein).

Like the Court of Appeals in this case, the Supreme Court of Illinois, as well as Louisiana and Kentucky appellate courts, have applied state law to the determination of the claim-preclusive effect of a federal judgment. *Nowak v. St. Rita High Sch.*, 197 Ill. 2d 381, 389-94, 757 N.E.2d 471, 477-80 (Ill. Supreme Ct. 2001); *Ansalve v. State Farm Mut. Auto. Ins. Co.*, 669 So. 2d 1328, 1333 (La. Ct. App. 1996); *Davis v. Powell's Valley Water Dist.*, 920 S.W.2d 75, 76-77 (Ky. Ct. App. 1995).

As the Supreme Court of New Jersey has observed, "[w]hen a state court considers the binding effect of a federal court judgment, nothing less is at stake than the integrity of federal judicial power and the coherence of the federalist judicial system." *Watkins*, 124 N.J. 398, 411-12, 591 A.2d 592, 598 (N.J. Supreme Ct. 1991). The Court of Appeals' approach to the claim-preclusion in this case, and the similar approach employed by the Supreme Court of Illinois and the Louisiana and Kentucky appellate courts, threatens that coherence by leaving States free to determine the force of federal judgments.

This Court should grant a writ of certiorari to examine, resolve, and clarify whether federal law governs the claim-preclusive effect of federal judgments. Otherwise, courts addressing this issue will face a split of authority when addressing that issue, leaving the force of federal judgments in doubt.

II. The Court Of Appeals' Conferral Of Claim-Preclusive Effect Upon A Federal Judgment Which Determined Only The Absence Of Subject-Matter Jurisdiction Not Only Conflicts With Federal And State Appellate Decisions Holding To The Contrary, But Also Enhances The Federalism Concerns Presented By Allowing States To Determine The Effect Of Federal Judgments And Creates Fundamental-Fairness Concerns.

Various federal and state appellate courts have held that a federal judgment dismissing an action for lack of subject-matter jurisdiction has no claim-preclusive effect. *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188-89 (5th Cir. 1986); *Gates v. Integris Baptist Medical Ctr. of Okla., Inc.*, 84 P.3d 115, 115-17 (Okla. Ct. Civ. App. 2003); *Tru-Line Metal Prods. v. U. S. Fabrication & Erection*, 52 P.3d 150, 154 (Supr. Ct. Alaska 2002). *Cf. Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 N.J. 398, 411-12, 591 A.2d 592, 598 (N.J. Supreme Ct. 1991)(holding that federal judgment dismissing claims for insufficiency of service of process and lack of standing lacked claim-preclusive effect); *State ex rel. Onslow County v. Mercer*, 128 N.C. App. 371, 378, 496 S.E.2d 585, 589 (1998)(holding that federal judgment dismissing claims for lack of case or controversy lacked claim-preclusive effect).

The Court of Appeals' claim-preclusion analysis in this case flatly contradicts those decisions. After setting forth the Maryland common law definition of *res judicata*, the Court of Appeals briefly examined the Fourth Circuit's opinion in Petitioner's federal action, noting the Fourth Circuit's statements that "WMATA possesses *Eleventh Amendment* immunity" and "is a state agency subject to all the benefits and liabilities of a state itself." *Id.* at 8a-9a (emphasis in original). It then stated that "the Fourth Circuit extensively examined virtually all of the arguments that underlie petitioner's present claim before this Court as to why the FMLA['s] personal leave provision ... should be found to abrogate WMATA's sovereign immunity" (without acknowledging that the Fourth Circuit addressed only the Eleventh Amendment aspect of sovereign immunity). *Id.* at 9a. The Court of Appeals next considered and rejected Petitioner's argument that the FMLA abrogates any immunity otherwise enjoyed by Respondents. *Id.* at 9a-13a. It then concluded (*id.* at 13a):

> In the present case the issue was finally litigated in the federal system. If the federal court was wrong, and we do not mean to say that it was, its ruling is nonetheless binding in the instant case. Because *res judicata* is determinative in the present case it is not necessary for us to select between the conflicting decisions of the several federal courts. We hold that *res judicata* effectively bars petitioner

from relitigating his FMLA claim in the Maryland court system.

The Court of Appeals' reasoning in this regard enhances the federalism concerns presented by that Court's application of Maryland law to the determination of the claim-preclusive effect of the federal judgment. Further, under such reasoning, the merits of claims that are dismissed by federal courts for lack of subject-matter jurisdiction will never be addressed – an obvious blow to fundamental fairness. This Court should grant a writ of certiorari for these additional reasons.

III. The Court Of Appeals' Conferral Of Claim-Preclusive Effect Upon A Federal Judgment Dismissing An Action Based On Eleventh-Amendment Immunity Conflicts With Various Federal And State Appellate Decisions And Creates Federalism And Fundamental-Fairness Concerns.

Various federal and state appellate courts have held that a federal judgment dismissing an action based on Eleventh-Amendment immunity lacks claim-preclusive effect. *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188-89 (5th Cir. 1986); *Tolis v. Board of Supervisors*, 655 So. 2d 747, 751-53 (La. Ct. App. 1995), *rev'd on other grounds*, 660 So. 2d 1206 (La. Supreme Ct. 1995); *Trammell v. State*, 622 So. 2d 1257, 1261

(Miss. Supreme Ct. 1993); *Medco Creamery v. State*, 65 Ore. App. 614, 618-19, 673 P.2d 537, 540 (1983).

As previously discussed, however, the Court of Appeals in this case gave claim-preclusive effect to the federal judgment. This result presents the same federalism and fundamental-fairness concerns inherent in the Court of Appeals' conferral of claim-preclusive effect upon the federal judgment dismissing the federal action for lack of subject-matter jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court should summarily reverse the holding of the Court of Appeals of Maryland.

Respectfully Submitted,

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(Any footnotes trail end of each document)

No. 32
September Term, 2004

IN THE COURT OF APPEALS
OF MARYLAND

Christopher T. Lizzi

v.

Washington Metropolitan Area Transit Authority, et al.

Filed: December 9, 2004

Bell, C. J.
Raker
Wilner
Cathell
Harrell
Battaglia
Greene, JJ.

Opinion by Cathell, J.

This case concerns the viability of a lawsuit brought by Christopher T. Lizzi, petitioner, who, on August 27, 1999, filed a three-count complaint in the Circuit Court for Prince George's County alleging that respondents, the Washington Metropolitan Area Transit Authority ("WMATA") and seven individuals employed by WMATA, fn1 unlawfully terminated petitioner's employment with WMATA: (1) in violation of the Family

and Medical Leave Act of 1993 fn2 ("FMLA" or "the Act") (29 U.S.C. §§ 2601 et seq.); (2) in breach of contract; and (3) in violation of the Maryland Constitution.

On January 4, 2002, the circuit court ruled, pursuant to a hearing on a motion to dismiss, that, because of the United States Court of Appeals' decision in Lizzi v. Alexander, et al., 255 F.3d 128 (4th Cir. 2001), cert. denied, 534 U.S. 1081, 122 S.Ct. 812, 151 L.Ed.2d 697, reh'g denied, 535 U.S. 952, 122 S.Ct. 1352, 152 L.Ed.2d 254 (2002), Counts I and II of petitioner's complaint were barred by res judicata and therefore dismissed. On March 29, 2002, the circuit court also ruled that Count III in petitioner's complaint was barred both by res judicata and by sovereign immunity.

On December 22, 2003, the circuit court's ruling was affirmed on appeal by the Court of Special Appeals of Maryland. fn3 Lizzi v. WMATA, 156 Md.App. 1, 845 A.2d 60 (2003). Petitioner thereafter petitioned this Court for Writ of Certiorari. On June 11, 2004, we granted the petition. Lizzi v. WMATA, 381 Md. 674, 851 A.2d 593 (2004).

Petitioner presents the following questions for our review:

"I. Did the Court of Special Appeals err by failing to hold that, under the United States Supreme Court's holding in [Nevada Department of Human Resources v.] Hibbs, [538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003),] the FMLA abrogates any state sovereign immunity of WMATA and its employees?

II. Did the Court of Special Appeals err by holding that the WMATA

Compact confers upon WMATA state sovereign immunity from

FMLA claims?

III. Did the Court of Special Appeals err by holding that [petitioner] is not entitled to maintain an action under the Maryland Constitution (and this Court's decision in Robinson v. Bunch [, 367 Md. 432, 788 A.2d 636 (2002)]) against WMATA for its violations of the FMLA's substantive provisions?

IV. Did the Court of Special Appeals err by holding that WMATA's (supposed) state sovereign immunity 'transfers' to the Supervisors, thereby immunizing them from personal liability for FMLA and Maryland Constitution violations committed in the scope of their official duties?

V. [Can] WMATA [] be held liable for breach of contract if it violates a personnel policy incorporating the FMLA[?] fn4" [Alterations added.] [Footnote added.]

Because we hold that res judicata effectively bars petitioner's FMLA claim, we do not address the remaining questions presented to this Court.

I. Facts

WMATA is an interstate compact agency and instrumentality of Maryland, Virginia, and the District of Columbia and serves to operate the Metrobus and Metrorail systems in the Washington, D.C., metropolitan

area. WMATA was created in 1966 with the consent of the United States Congress. See Washington Metropolitan Area Transit Authority Compact, Pub.L. No. 89-774, 80 Stat. 1324 (1966).

Petitioner was employed by WMATA as a bus wheelchair lift mechanic prior to his termination in September 1997. The termination was a result of petitioner's alleged misuse of sick days and vacation leave so as to be absent from his employment for extended periods of time. Petitioner contested his termination and first filed suit in the federal court system, alleging that his firing was in violation of the FMLA and naming WMATA and seven individual supervisors of WMATA as defendants in the suit. Petitioner subsequently filed the instant suit in the Circuit Court for Prince George's County.

A. The Federal Court Proceedings

On August 7, 1998, petitioner first filed suit, based on the same facts and cause of action as the case sub judice, in the United States District Court for the District of Maryland. While petitioner's original complaint in the federal court action contained six counts, all but the count concerning WMATA's alleged violation of the FMLA were voluntarily dismissed by petitioner. The federal district court granted summary judgment on the remaining FMLA count in favor of WMATA, but allowed the suit to continue as against the named defendant supervisors in their individual capacities.

On appeal to the United States Court of Appeals for the Fourth Circuit, the federal appellate court affirmed the dismissal of WMATA but reversed with respect to the individual defendant supervisors, ordering that the

supervisors be dismissed from the suit as well. Lizzi v. Alexander, 255 F.3d at 138. The Fourth Circuit stated that "[b]ecause sovereign immunity extends to WMATA, and because the claims against the WMATA employees are in reality claims against the agency itself, we affirm in part, reverse in part, and remand with directions to dismiss the action." Id. at 130.

Petitioner thereafter petitioned for a rehearing/rehearing en banc, both of which were denied by the Fourth Circuit on July 17, 2001. On January 7, 2002, the United States Supreme Court denied petitioner's Petition for Writ of Certiorari. Lizzi v. WMATA, 534 U.S. 1081, 122 S.Ct. 812, 151 L.Ed.2d 697, reh'g denied, 535 U.S. 952, 122 S.Ct. 1352, 152 L.Ed.2d 254 (2002).

B. Maryland Court Proceedings

On August 27, 1999, more than a year subsequent to the filing of his federal claim, petitioner filed the instant action in the Circuit Court for Prince George's County. As stated, supra, petitioner's complaint, as amended, contained three counts. Petitioner's FMLA claim, his initial count, was identical to that advanced in the then-pending federal court action. Because of the pending federal court action, the circuit court ordered a stay of the state court action pending the decision by the Fourth Circuit in the federal court action.

After receiving a favorable decision by the Fourth Circuit in the federal action, WMATA filed a motion in the circuit court to (1) lift the stay in the state court action and (2) dismiss the entire action. On January 4, 2002, subsequent to a hearing on the motions, the circuit court dismissed Counts I (FMLA claim) and II (contract claim) of

petitioner's complaint on the ground of res judicata. At a later hearing on March 29, 2002, the circuit court dismissed Count III (Maryland Constitution claim) of petitioner's complaint as being barred by both sovereign immunity and res judicata. fn5

On appeal to the Court of Special Appeals, the court was "asked to decide whether the circuit court correctly dismissed all three counts of [petitioner's] complaint on the ground of res judicata and, insofar as Count III is concerned, the additional ground of sovereign immunity." Lizzi v. WMATA, 156 Md.App. at 6, 845 A.2d at 63 (alteration added). While the intermediate appellate court did affirm the decision of the circuit court, it did so in relation to petitioner's Counts I and II "for reasons other than those relied upon by that court." Id. at 7, 845 A.2d at 63. In explaining its reasoning behind its departure from the reasons for dismissal given by the circuit court, the Court of Special Appeals stated:

"It is not necessary that we decide whether res judicata bars [petitioner's] suit on the ground that the federal court ruled [respondents] immune. This is because we hold that WMATA and the individual [supervisors] are shielded from suit in state court by the doctrine of sovereign immunity, and that WMATA has not waived that immunity for claims such as those brought by [petitioner]."

Id. at 8, 845 A.2d at 64 (alterations added).

II. Discussion

Petitioner initially contends that, under Maryland Rule 8-131 (2004), WMATA's claim that res judicata bars the

claim sub judice from proceeding is improper insofar as it was not raised in either WMATA's response to petitioner's certiorari petition or in any cross-petition. That lack of action, petitioner claims now bars the issue from being raised in WMATA's brief to this Court. Maryland Rule 8-131 provides, in pertinent part:

"Rule 8-131. Scope of review.

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." [Emphasis added.]

The issue of res judicata was raised in and has been fully determined by the trial court. If, we were to determine that petitioner's other claims had merit, we would be required to remand this case to the Court of Special Appeals for it to determine the issue relating to res judicata and the determination of that court would in all likelihood be the subject of another Petition to this Court. Thus, we find it preferable to address the res judicata issue at this point, so as "to avoid the expense and delay of another appeal," as is intended under the language of Maryland Rule 8-131 (a). fn6 It would be a waste of judicial resources to remand the case, and the burden of resolving this issue, to the Court of Special Appeals for it to determine the issue when it would, in all probability, end up back here. Therefore, we shall proceed with an

examination of whether res judicata does in fact bar petitioner's FMLA claim.

Res judicata literally means "a thing adjudicated," and generally indicates "[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit." BLACK'S LAW DICTIONARY 1336-37 (8th ed. 2004). See Alvey v. Alvey, 225 Md. 386, 390, 171 A.2d 92, 94 (1961) (stating that "[t]he doctrine of res judicata is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit"); see also Mackall v. Zayre Corp., 293 Md. 221, 228, 443 A.2d 98, 102 (1982) (stating that "if a proceeding between parties involves the same cause of action as a previous proceeding between the same parties, the principle of res judicata applies and all matters actually litigated or that could have been litigated are conclusive in the subsequent proceeding"). Res judicata is based "upon the judicial policy that the losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on issues raised, or that should have been raised." Colandrea v. Wilde Lake Community Ass'n, Inc., 361 Md. 371, 391, 761 A.2d 899, 909 (2000).

In the case sub judice, WMATA claims that the Fourth Circuit's decision in Lizzi v. Alexander, et al., 255 F.3d 128 (4th Cir. 2001), effectively bars petitioner's present claims because of res judicata. In order to ascertain whether WMATA's contention is correct, we must first

examine the extent of the Fourth Circuit's holding in Lizzi.

In its decision in Lizzi, the Fourth Circuit noted "at the outset that WMATA possesses Eleventh Amendment fn7 immunity. The signatories of the [WMATA] compact intended to confer Eleventh Amendment immunity on WMATA." Id. at 132 (alteration added) (footnote added). The Fourth Circuit further stated that "WMATA is a state agency, subject to all the benefits and liabilities of a state itself, including sovereign immunity." Id. (emphasis added).

In its discussion as to why the WMATA compact had not evidenced an intent to waive WMATA's sovereign immunity, fn8 despite petitioner's contention that it did, the Fourth Circuit extensively examined virtually all of the arguments that underlie petitioner's present claim before this Court as to why the FMLA, specifically the personal-leave provision of 29 U.S.C. § 2612 (a)(1)(D), should be found to abrogate WMATA's sovereign immunity. In fact, the only new wrinkle in petitioner's argument that makes for even the slightest difference in the case as it was presented to the Fourth Circuit and as it is now presented before this Court is petitioner's inclusion in his brief of the recent United States Supreme Court case of Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), which petitioner claims effectively overruled the Fourth Circuit's Lizzi decision.

With Hibbs, the Supreme Court had before it the opportunity to settle a disagreement among the federal courts of appeal as to whether there existed sovereign immunity of a state in a private action for damages under

the FMLA. fn9 In holding that, notwithstanding state sovereign immunity, employees of the State of Nevada could recover money damages in federal court in the event of the state's failure to comply with the FMLA's family-leave provision, see 29 U.S.C. § 2612 (a)(1)(C), the Supreme Court settled the question of whether a state could be sued in relation to alleged violations of the family-leave provision of the FMLA. fn10 What the decision did not do, regardless of how vigorously petitioner claims otherwise, was provide that the personal-leave provision of the FMLA, see 29 U.S.C. § 2612 (a)(1)(D), also allows for states to be sued when alleged violations of the personal-leave provision are asserted. Chief Justice Rehnquist, writing for the Court, made it clear that the Hibbs decision was limited in its scope to only the family-care provision of the FMLA. See Hibbs, 538 U.S. at 724, 123 S.Ct. at 1976 (stating that state employees may recover money damages "in the event of the State's failure to comply with the family-care provision of the Act") (emphasis added). In the entirety of the Hibbs opinion, never once does the Supreme Court discuss the personal-leave provision of the FMLA, the only provision at issue now before this Court, and its effect on sovereign immunity.

The fact that Hibbs does nothing to inhibit the res judicata effect of the Fourth Circuit's decision in Lizzi upon the case sub judice is supported by the Court of Appeals for the Tenth Circuit's post-Hibbs opinion in Brockman v. Wyoming Dep't of Family Servs., 342 F.3d 1159 (10th Cir. 2003), cert. denied, ___U.S.___ , 124 S.Ct. 1509, 158 L.Ed.2d 155 (2004). Brockman dealt with a Wyoming state employee who claimed that hostility from her supervisors had caused her to suffer from post-traumatic stress disorder which led to her taking leave

from her employment. After exhausting her FMLA-provided 12 weeks of leave, Brockman returned to her employment but shortly thereafter requested an additional period of leave, which her employer was not willing to allow. The state agency thereafter terminated her employment. Brockman then sued the State of Wyoming and the state employees alleged to have created the hostile environment, claiming, inter alia, that the termination was in violation of the personal-leave provision of the FMLA. After the federal district court granted summary judgment to the defendants, Brockman appealed the decision to the Tenth Circuit, one of her arguments being that "sovereign immunity does not bar her claims under [] the FMLA . . . ." Brockman, 342 F.3d at 1163.

Recognizing the recent Supreme Court decision in Hibbs and its effect as to only the family-care provision of the FMLA, the Tenth Circuit found that "the self-care provision in [29 U.S.C. § 2612 (a)(1)(D)] is not implicated by that decision." Brockman, 342 F.3d at 1164 (alteration added) (emphasis added). The Tenth Circuit stated that, while "the Supreme Court's analysis in Hibbs turned on the gender-based aspects of the FMLA's § 2612 (a)(1)(C) [the family-leave provision] . . . [t]he legislative history accompanying the passage of the FMLA reveals two motivations for the inclusion of the self-care provision," none of which was to prevent gender discrimination. Id. (alteration added). In clarifying this point, the federal court of appeals stated:

"First, Congress was attempting to alleviate the economic burdens to both the employee and to his or her family of illness-related job-loss. See S.Rep. No. 103-3, at 11 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 13-14; H.R.Rep. No.

101-28(I), at 23 (1990). Second, Congress was attempting to prevent those with serious health problems from being discriminated against by their employers. See S.Rep. No. 103-3, at 12; H.R. Rep. 101-28(I), at 23. The legislative history does not, however, identify as the basis for subsection (D) a link between these two motivations and any pattern of discriminatory stereotyping on the part of the states as employers."

Id.

We agree with the Tenth Circuit's decision in Brockman insofar as it relates to the effect that the Supreme Court's decision in Hibbs has on the personal-leave provision of the FMLA, i.e., that it does not have any effect on that particular provision. The Fourth Circuit's holding in Lizzi as it relates to the FMLA personal-leave provision – that it is not a valid abrogation of state sovereign immunity – is not disturbed by the Supreme Court's opinion in Hibbs and effectively bars petitioner's present claims because of res judicata. See Solley v. Big Spring State Hosp., ___ F. Supp. 2d ___ (N.D. Tex. 2004) (federal district court finding that a pre-Hibbs federal appellate case holding that Congress could not waive a state's sovereign immunity as against FMLA personal-leave claims was not abrogated by the Hibbs decision, which only dealt with the family-leave provision of the FMLA); Bryant v. Mississippi State University, 329 F.Supp.2d 818, 822 (N.D. Miss. 2004) (federal district court stating that "it would be utterly unreasonable to assume that the Supreme Court [in Hibbs] intended to make a broad sweeping approval of the FMLA's attempted abrogation of states' immunity in light of the precise and specific analysis related wholly to [the family-leave provision] and the court's carefully worded holding") (alterations added)

(emphasis added).

There are post-Hibbs cases in the federal system that have held contrary to the cases we cite above. See, e.g., Montgomery v. Maryland, 72 Fed.Appx. 17, 19 (4th Cir. 2003) (per curiam) (stating that, under Hibbs, "sovereign immunity does not protect the states in FMLA actions"); Toeller v. Wisconsin Dep't of Corrections, 296 F.Supp.2d 946 (E.D. Wis. 2003) (federal district court extending the reasoning in Hibbs to the personal-leave provision of the FMLA). In the present case the issue was finally litigated in the federal system. If the federal court was wrong, and we do not mean to say that it was, its ruling is nonetheless binding in the instant case. Because res judicata is determinative in the present case it is not necessary for us to select between the conflicting positions of the several federal courts. We hold that res judicata effectively bars petitioner from relitigating his FMLA claim in the Maryland court system.

There ostensibly remains the issue of petitioner's state constitutional claims. At the Court of Special Appeals, that court identified the issue before it in relation to state constitutional claims as,

"IV. Whether appellant's state constitutional law claim is barred by limitations?"

At the Circuit Court the defendants argued that the state constitutional claims were barred by the doctrine of res judicata because, according to them, the appropriate provisions of the federal statute at issue permitted them to be brought in the federal district court so long as they arose out of the same factual situation. The defendants also argued that the state constitutional claim was time-

barred as well. Their motion to dismiss that count was granted by the trial judge on immunity and res judicata grounds without any mention of limitations.

However, at the Court of Special Appeals the respondents argued, and petitioner responded to that argument in his reply brief, that the state constitutional claim was filed more than three years after the termination of petitioner and thus was untimely filed and that the issue had been raised at the trial court (as, in fact, it was). Petitioner argued below (at both courts) that the claim was timely filed because it related back to the prior counts.

At the time the state constitutional count was added, counts substantially similar to the prior counts filed in the state court had already been resolved and dismissed in the federal courts and we have held that the preclusive effect of the federal courts' actions was res judicata and that those counts, accordingly, could not be maintained in the state action. Thus, with our holding based upon res judicata principles that those counts were properly dismissed the third count stands alone. And it was untimely filed.

III. Conclusion

We hold that petitioner's present claim concerning the ability of the personal-leave provision of the FMLA to overcome the sovereign immunity of this State is barred due to the res judicata effect of the Fourth Circuit's opinion in Lizzi v. Alexander, et al., 255 F.3d 128 (4th Cir. 2001), cert. denied, 534 U.S. 1081, 122 S.Ct. 812, 151 L.Ed.2d 697, reh'g denied, 535 U.S. 952, 122 S.Ct. 1352, 152 L.Ed.2d 254 (2002). Therefore, while we affirm the

decision of the Court of Special Appeals, the reasoning behind our affirmance is not identical to that of the intermediate appellate court but is based on res judicata. Because of our holding, there is no need to address petitioner's remaining questions.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY PETITIONER.

Footnotes

fn1 In his brief, petitioner characterizes and refers to these named employees as "supervisors."

fn2 As we shall discuss, infra, petitioner's FMLA claim is more specifically a claim relating to 29 U.S.C. § 2612 (a)(1)(D) of the Act, otherwise known as the personal-leave provision. This provision states:

"§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

. . .

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position

of such employee."

fn3 As we shall discuss, infra, the intermediate appellate court affirmed the dismissal of petitioner's suit, but it did so without addressing whether res judicata, an issue presented to it, barred petitioner's claims.

fn4 This fifth and final question was mentioned in petitioner's brief to this Court, but was not specifically included in his Petition for Writ of Certiorari.

fn5 A later hearing on Count III was needed because petitioner did not add this count to his complaint until he filed a second amended complaint, which was filed on the morning of the first motions hearing on January 4, 2002.

fn6 Our decision to address the question of whether res judicata bars petitioner's claim is further bolstered by the fact that the circuit court based its dismissal of two of petitioner's counts solely on res judicata, and a third count because of both res judicata and the court's own finding of sovereign immunity. The issue was also extensively briefed in WMATA's brief before the Court of Special Appeals, as well as in WMATA's brief to this Court. Therefore, WMATA's res judicata defense cannot be said to have appeared out of thin air. It is not a surprise to petitioner. Additionally, petitioner responded to the issue in this Court by referring the Court to his briefing of this issue in the Court of Special Appeals.

fn7 The Eleventh Amendment to the United States Constitution states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by

Citizens or Subjects of any Foreign State." The United States Supreme Court has extended the states' Eleventh Amendment immunity to suits against a state by its own citizens. See Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); see also Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974) (stating that the Supreme Court "has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State").

fn8 An identical conclusion regarding the effect of the language of the WMATA compact was reached by the Court of Special Appeals in its decision below. See Lizzi, 156 Md.App. at 9-10, 845 A.2d at 65-66.

fn9 At the time of the Supreme Court's decision in Hibbs, only the Court of Appeals for the Ninth Circuit had held that a specific provision of the FMLA abrogated sovereign immunity, see Hibbs v. Dep't of Human Resources, 273 F.3d 844 (9th Cir. 2001), while at least three of the federal circuit courts of appeal had held that no section of the FMLA contained a valid abrogation of state sovereign immunity. See, e.g., Chittister v. Dep't of Community and Economic Dev., 226 F.3d 223 (3d Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559 (6th Cir. 2000); Townsel v. Missouri, 233 F.3d 1094 (8th Cir. 2000). As we discuss, infra, those decisions have since been overruled in part by Hibbs, as the Supreme Court has specifically found that the FMLA's family-leave provision, see 29 U.S.C. § 2612 (a)(1)(C), does abrogate sovereign immunity.

fn10 In reaching this holding, which is limited to the family-leave provision of the FMLA, the Supreme Court

found that the impetus for the family-leave provision was to alleviate the effects of gender discrimination in the workplace. The Supreme Court stated that existing "state practices continue to reinforce the stereotype of women as caregivers," Hibbs, 538 U.S. at 738, 123 S.Ct. at 1983, and that the family-leave provision of the FMLA was enacted to combat such patterns of discriminatory stereotyping.

No. 420
September Term, 2002

COURT OF SPECIAL APPEALS
OF MARYLAND

CHRISTOPHER T. LIZZI

v.

WASHINGTON METROPOLITAN
AREA TRANSIT AUTHORITY

December 22, 2003, Filed

COUNSEL: Argued by: Paul F. Evelius (Wright, Constable & Skeen, LLP on the brief) all of Baltimore, MD. for Appellant.

Argued by: Gerard J. Stief (Cheryl C. Burke, Robert J. Kniaz, Sonia A. Bacchus, Washington Metropolitan Area Transit Authority on the brief) all of Washington, D.C. for Appellee.

JUDGES: Panel: Eyler, James R., Barbera, Bloom, Theodore G., Retired, Specially Assigned, JJ. Opinion by: Barbera, J.

OPINION BY: Barbera

OPINION:

Opinion by Barbera, J.

Appellant, Christopher T. Lizzi, sued appellees, the Washington Metropolitan Area Transit Authority

("WMATA") and seven individuals employed by WMATA, for unlawful termination of employment. On motion of appellees, the Circuit Court for Prince George's County dismissed all three counts of appellant's complaint on the ground of res judicata, and the third count on the additional ground of state sovereign immunity.

Appellant appeals and raises the following issues for our review:

I. Whether the federal court's dismissal for lack of subject matter jurisdiction of appellant's claims against WMATA in the federal court lawsuit is res judicata as to appellant's claims against WMATA in this case.

II. Whether the federal court's dismissal for lack of subject matter jurisdiction of appellant's claims against the individual defendants in their official capacities in the federal court lawsuit is res judicata as to appellant's claims against the individual defendants in their individual capacities in this case.

III. Whether sovereign immunity bars appellant's claims against any of the appellees.

IV. Whether appellant's state constitutional law claim is barred by the statute of limitations?

We conclude that appellant's complaint was barred by sovereign immunity, and therefore affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Because this appeal is from the dismissal of appellant's complaint, the facts are as alleged by him. Appellant was

employed by WMATA as a Metro wheelchair life mechanic at all times relevant to this action. During the summer of 1997, he missed several weeks of work due to a number of medical conditions that arose within the same two-month period.

WMATA directed appellant to submit to a medical examination on August 14, 1997. He refused, explaining that he was taking delusive medication for his periodontal problems, and therefore unable to drive himself to the examination. WMATA warned him that if he failed to submit to the examination, he would be terminated.

On August 18, 1997, appellant appeared for a medical examination conducted by a physician regularly employed by WMATA. When the physician requested that appellant return the next day for an independent medical examination, appellant refused, again citing the delusive effects of his medication. Upon appellant's failure to submit to the second examination, WMATA notified him that he "was under investigation which [could] lead to his dismissal."

According to his complaint, appellant thereafter applied for leave under the federal Family and Medical Leave Act ("FMLA") for periods from June 20 to July 5, 1997, and August 9 to August 23, 1997. On the day he filed his FMLA leave application, appellant was notified that he was terminated for having violated the requirement that he submit to the independent medical examination.

Within the next several weeks, appellant filed suit in both the United States District Court for the District of Maryland and the Circuit Court for Prince George's County, alleging in both actions that WMATA and seven

individual defendants, all of whom were employees of WMATA, had violated his rights under FMLA. Appellant subsequently amended his state court complaint to add a claim for breach of contract. WMATA and the individual defendants answered the amended complaint asserting, among eighteen affirmative defenses, the defenses of sovereign immunity, res judicata, and collateral estoppel.

In March 2001, the circuit court ordered a stay of the state court action pending the decision of the United States Court of Appeals for the Fourth Circuit in the federal action. The federal district court had previously ruled that Eleventh Amendment immunity barred appellant's claims against WMATA, but that FMLA permits appellant to bring an action against the employees of WMATA in their individual capacities. The question on appeal was whether appellant's claims as to all defendants in federal court were barred on the ground of Eleventh Amendment immunity. fn1

In an opinion decided June 20, 2001, the Fourth Circuit affirmed in part and reversed in part the district court's ruling. The Fourth Circuit held that the entirety of appellant's complaint must be dismissed for lack of subject matter jurisdiction because the individual defendants as well as WMATA were immune from suit in federal court. Lizzi v. Alexander, et al., 255 F.3d 128 (4th Cir. 2001), cert. denied sub nom. Lizzi v. Washington Metro. Area Transit Auth., 534 U.S. 1081, 151 L. Ed. 2d 697, 122 S. Ct. 812 (2002).

Following issuance of the Fourth Circuit's opinion, WMATA filed a motion to (1) lift the stay in the state court action and (2) dismiss the entire action. The parties appeared for a motions hearing on January 4, 2002. On the

morning of the hearing, counsel for appellant filed a second amended complaint, adding a third count claiming violations by the individual defendants of appellant's state constitutional rights. fn2

At the close of arguments, the court dismissed Counts I and II of appellant's complaint on the ground of res judicata. The court did not rule on the then-newly-added Count III of the second amended complaint, affording WMATA the opportunity to respond to it.

WMATA filed a motion to strike the second amended complaint or, in the alternative, to dismiss Count III on the grounds of sovereign immunity, res judicata, and statute of limitations. The motion came on for a hearing on March 29, 2002. After hearing arguments, the court dismissed Count III on two grounds, sovereign immunity and res judicata.

This appeal followed.

DISCUSSION

We are asked to decide whether the circuit court correctly dismissed all three counts of appellant's complaint on the ground of res judicata and, insofar as Count III is concerned, the additional ground of sovereign immunity. We shall affirm the circuit court's dismissal of appellant's complaint but, at least insofar as Counts I and II are concerned, for reasons other than those relied upon by that court.

The standards governing the grounds for filing a motion to dismiss, the grant of such a motion, and the appellate courts' review of the ruling are well settled.

Under Maryland Rule 2-322(b)(2) (1996), a defendant may seek a dismissal on the ground that the complaint fails "to state a claim upon which relief can be granted." When moving to dismiss, a defendant is asserting that, even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter of law. Thus, in considering a motion to dismiss for failure to state a claim, the circuit court examines only the sufficiency of the pleading. "The grant of a motion to dismiss is proper if the complaint does not disclose, on its face, a legally sufficient cause of action." This Court, therefore, shall assume the truth of all well-pleaded relevant facts as alleged in appellant's complaint and all reasonable inferences drawn therefrom.

Heritage Harbour, L.L.C. v. John J. Reynolds, Inc., 143 Md. App. 698, 704-05, 795 A.2d 806 (2002). Moreover, in reviewing a court's grant of a motion to dismiss, we must determine whether the decision was legally correct. Porterfield v. Mascari II, Inc., 142 Md. App. 134, 139, 788 A.2d 242 (2002), aff'd, 374 Md. 402, 823 A.2d 590 (2003). Thus, so long as the complaint, on its face, does not state a claim upon which relief can be granted, we may affirm the dismissal of the complaint, even if on a ground not relied upon by the circuit court. Society of Am. Foresters v. Renewable Natural Res. Found., 114 Md. App. 224, 233 n.3, 689 A.2d 662 (1997).

As we have said, the circuit court dismissed all three counts of the complaint on the ground of res judicata, and Count III on the additional ground of sovereign immunity. Appellant vigorously attacks the circuit court's reliance upon res judicata in dismissing the state action. Appellant argues preliminarily that, because the dismissal of the federal suit was for lack of subject matter

jurisdiction, it was without prejudice and, therefore, is not a judgment "on the merits"; consequently, it had no preclusive effect on his state suit. Appellant further argues that the federal court's decision, with respect to both WMATA and the individual defendants, was grounded on Eleventh Amendment immunity and, since Eleventh Amendment immunity only bars suit in federal court, the Fourth Circuit's decision did not decide the different question of whether appellant is precluded from suing these same defendants in state court.

WMATA and the individual appellees respond with equal vigor. They argue, inter alia, fn3 that the federal court's judgment is a judgment on the merits, and that it was not based merely on Eleventh Amendment immunity but on the broader ground of sovereign immunity. Therefore, appellees argue, the circuit court was legally correct in dismissing the state action on the grounds of res judicata.

It is not necessary that we decide whether res judicata bars appellant's suit on the ground that the federal court ruled the appellees immune. This is because we hold that WMATA and the individual appellees are shielded from suit in state court by the doctrine of sovereign immunity, and that WMATA has not waived that immunity for claims such as those brought by appellant. fn4

WMATA was created by interstate compact with the consent of the United States Congress in 1966. The signatories to the WMATA Compact ("the Compact") are Maryland, Virginia, and the District of Columbia. See Md. Code (1977, 2001 Rep. Vol.), § 10-203 of the Transportation Article. fn5 Because the Compact was created by Congressional consent, issues relating to its construction are a matter of federal law. Morris v.

Washington Metro. Area Transit Auth., 251 U.S. App. D.C. 42, 781 F.2d 218, 220 n.2 (D.C. Cir. 1986) (citing Cuyler v. Adams, 449 U.S. 433, 438, 66 L. Ed. 2d 641, 101 S. Ct. 703 (1981)).

WMATA enjoys sovereign immunity as if it were the State or one of its agencies, because such immunity was conferred upon it by Maryland upon its signing the Compact. Maxwell v. Washington Metro. Area Transit Auth., 98 Md. App. 502, 513, 633 A.2d 924 (1993). In Maxwell we said,

"WMATA's sovereign immunity exists because the signatories have successfully conferred their respective sovereign immunities upon it. Congress has power to legislate for the District of Columbia and to create an instrumentality that is immune from suit. Maryland and Virginia have immunity under the eleventh amendment [in federal courts] and each can confer that immunity upon instrumentalities of the state. It is clear that each of the three signatories attempted to confer its sovereign immunity upon WMATA. We think they succeeded."

Id. at 514 (citation omitted); see also Beebe v. Washington Metro. Area Transit Auth., 327 U.S. App. D.C. 171, 129 F.3d 1283, 1287 (D.C. Cir. 1997) ("In signing the WMATA Compact, Maryland, Virginia, and the District of Columbia conferred upon WMATA their respective sovereign immunities.").

"[A] waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 261, 142 L. Ed. 2d 718, 119 S. Ct. 687 (1999); accord Martin v. Washington Metro. Area Transit Auth., 273 F. Supp.

2d 114, 119 (D.D.C. 2003). "Such a waiver must also be 'unequivocally expressed' in the statutory text." Blue Fox, 525 U.S. at 261 (citation omitted).

The only express waiver of the signatories' sovereign immunity is a partial waiver and is found in Section 80 of the Compact. That section provides:

> The Authority shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the zone of any immunity from suit.

§ 10-204(80) (emphasis supplied). It is evident from this provision of the Compact that, with the exception of claims involving contracts and torts committed in the conduct of any proprietary function, WMATA has not waived its immunity from suit.

Appellant asks us, in effect, to ignore the language in Section 80 that limits its waiver of sovereign immunity and to interpret the "sue and be sued" clause in Section 12(a) of the Compact as a waiver of WMATA's sovereign immunity. Section 12(a) provides: "In addition to the powers and duties elsewhere described in this title, and except as limited in this title, the Authority may . . . (a)

Sue and be sued." § 10-204(12)(a) (emphasis supplied). We decline to read Section 12(a) as appellant suggests.

It is well settled that "'where the statute to be construed is a part of a statutory scheme, the legislative intention is not determined from that statute alone, rather it is to be discerned by considering it in light of the statutory scheme.'" Breitenbach v. N.B. Handy Co., 366 Md. 467, 480, 784 A.2d 569 (2001) (citation omitted). We, therefore, may not read Section 12(a) in a vacuum; rather, we must consider it together with Section 80 of the Compact. That section, as we have noted, plainly delineates the limited classes of cases for which WMATA has waived immunity, while at the same time making express that, for all other cases, the signatories retain their immunity from suit.

It has been held that the "sue and be sued" language of Section 12(a) "extends only as far as the more specific (and partial) waiver of sovereign immunity contained in section 80 of the Compact." Watters v. Washington Metro. Area Transit Auth., 353 U.S. App. D.C. 36, 295 F.3d 36, 40 (D.C. Cir. 2002), cert. denied, 538 U.S. 922, 123 S. Ct. 1574, 155 L. Ed. 2d 313 (2003); accord Lizzi, 255 F.3d at 133-34. We concur with the federal courts' construction of the "sue and be sued" wording of Section 10-204(12)(a).

Appellant's suit is in three counts: violation of FMLA (Count I); breach of contract (Count II); and violation of Articles 19, 24 and 46 of the Maryland Declaration of Rights (Count III). It is clear that Counts I and III do not allege a suit in contract or tort involving a proprietary function. fn6 Therefore, WMATA is immune from suit because neither count comes within the limited waiver of immunity expressed by Section 80.

Moreover, although appellant's Count II is couched in terms of "breach of contract," which, by invocation of those words would seemingly bring that count within WMATA's waiver of immunity in Section 80 for suits involving its contracts, we conclude that, fairly read, the count does not allege a contract breach. Instead, like Count I, it alleges a violation of FMLA. Count II reads:

Defendant WMATA and plaintiff entered into a contract under which WMATA was obligated to comply with the provisions of the FMLA and/or certain policies and procedures adopted by WMATA and promulgated by WMATA to plaintiff (which policies and procedures contain provisions similar to the provisions of the FMLA and include, but are not limited to, WMATA Policy/Instruction 7.23/0 and WMATA FMLA Processing Guidelines). Defendant WMATA terminated plaintiff in violation of that contract, causing plaintiff damages.

The Compact contains no references that we could find to a contract between the agency and its employees to adhere to the dictates of FMLA, and appellant does not suggest otherwise. The only provision of the Compact that would appear to cover appellant's claim is Section 66, which is entitled "Labor standards," and calls for labor disputes to be resolved by resort to binding arbitration. See § 10-204(66)(c). fn7

Moreover, the policies and procedures cited in Count II, even as characterized by appellant, do not reference a contract between the parties but, rather, simply set forth "provisions similar to the provisions of FMLA." We shall not countenance appellant's attempt to come within the scope of WMATA's limited waiver of immunity for contract claims simply by denominating a FMLA

violation as one for breach of contract. We conclude, therefore, that Count II, like Counts I and III, is barred by sovereign immunity.

Appellant seeks to escape the foreclosing effect of WMATA's sovereign immunity, at least insofar as the state constitutional claims raised in Count III are concerned, by resort to the Court of Appeals' decision last year in Robinson v. Bunch, 367 Md. 432, 788 A.2d 636 (2002). That case affords him no relief.

In Robinson, the plaintiffs were employees (and one former employee) of the Division of Parole and Probation within the Maryland Department of Public Safety and Correctional Services. The plaintiffs filed suit against the Secretary of the Department, claiming that the Department's failure to compensate them for overtime work violated the federal Fair Labor Standards Act ("FLSA"). The circuit court granted the Secretary's motion to dismiss. This Court reversed that ruling, holding, inter alia, that FLSA preempted the Maryland statutory administrative and judicial remedy provided in Md. Code (1993, 1997 Repl. Vol.), § 12-402 of the State Personnel and Pensions Article ("SPP"). Bunch v. Robinson, 122 Md. App. 437, 461-62, 712 A.2d 585 (1998).

The Court of Appeals granted the Secretary's petition for a writ of certiorari to answer the question of whether Congress possessed the power to abrogate a state's sovereign immunity for suits under FLSA that are filed in state court. The Court of Appeals stayed the appeal pending the United States Supreme Court's opinion in Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). After the Supreme Court issued its decision in Alden, the Secretary moved for summary reversal of

this Court's decision. The employees did not oppose the motion. Robinson, 367 Md. at 438.

The Court of Appeals denied the motion and amended its order granting certiorari to address whether the plaintiffs maintained the right to pursue their FLSA claim against the Department in state court pursuant to the state constitution or other state law. Id. at 438-39. In its opinion deciding that question, the Court declared preliminarily that "the Alden case made it clear that the FLSA could not constitutionally authorize an action such as the one here involved. At the same time, however, the Supreme Court made it clear in Alden that state law could authorize such actions." Id. (internal citation omitted).

The Court of Appeals proceeded on the assumption that the substantive overtime provisions of FLSA are applicable to the plaintiff employees, because the Secretary did not challenge this Court's holding that the substantive provisions were applicable. With that assumption, the Court considered whether any state law provided the employees a remedy for violations of FLSA or state law respecting the entitlement to overtime compensation. Id. at 442- 43.

The Court examined SPP § 8-302, which provides that state employees are eligible for overtime compensation provided in that subtitle or, to the extent applicable, as required by the FLSA. See Md. Code (1993, 1997 Repl. Vol.), § 8-302 of the State Personnel and Pensions Article. The Court also considered Subtitle 14 of the same Article, which waives the state's sovereign immunity with respect to claims filed pursuant to SPP § 8-302 and provides a remedy for violations thereof. Id. at 443. The Court concluded:

The above-reviewed statutory provisions make it clear that covered state employees are entitled to overtime compensation in accordance with applicable state law or the FLSA, whichever is greater, that there is a duty on the part of the State or the appropriate officials to make such payments or provide for them through the budget process, and that sovereign immunity is not a defense.

Id.

The Court then observed that, "if the General Assembly had not enacted a specific statutory remedy, state employees would certainly have a common law remedy in Maryland courts to enforce their rights to mandated overtime compensation under state or federal law." Id. at 444. Specifically, "'Article 19 [of the Maryland Declaration of Rights] insures that rights belonging to Marylanders are "not illegally or arbitrarily denied by the government."'" Id. (quoting Doe v. Doe, 358 Md. 113, 127-28, 747 A.2d 617 (2000) (quoting State v. Board of Educ. of Montgomery County, 346 Md. 633, 647, 697 A.2d 1334 (1997))).

Appellant seizes upon this observation in Robinson to suggest that WMATA is subject to the remedies set forth in Articles 19, 24, and 46 of Maryland's Declaration of Rights without regard, apparently, to WMATA's immunity to all but the narrow class of suits identified in Section 80 of the Compact. We disagree.

We note, preliminarily, that the Court of Appeals has specifically stated, in an action involving claims for wrongful dismissal under Articles 24 and 46, that "the doctrine of sovereign immunity . . . precludes such a damages action against the 'State of Maryland' absent

legislation consenting to the suit." Ritchie v. Donnelly, 324 Md. 344, 369, 597 A.2d 432 (1991). WMATA has not waived its immunity to be sued in state court for violations of the Maryland Declaration of Rights.

Furthermore, appellant overlooks that WMATA is an interstate compact. One party to an interstate compact may not unilaterally subject the compact agency to its laws without the consent of the other parties to the compact. In discussing compact agencies, the Supreme Court has said that these entities "typically are creations of three discrete sovereigns: two States and the Federal Government." Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 40, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994). "No single State has dominion over an entity created by interstate compact," "state/federal shared power is the essential attribute of such an entity," and, as such, a compact "'shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact.'" Id. at 42 and n.11 (citation omitted). The Court went on in Hess to contrast an interstate compact agency with a single state, saying that, although the voters of a single state "may exercise their political will to direct state policy; bistate entities . . . are not subject to the unilateral control of any one of the States that compose the federal system." Id. at 42. fn8

Thus, the Fourth Circuit has held that Article III, Section 40 of the Maryland Constitution prohibiting "quick take" condemnations did not prohibit WMATA from utilizing such condemnations to acquire property. Washington Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1321-22 (4th Cir.), cert. denied, 464 U.S. 893, 78 L. Ed. 2d 229, 104 S. Ct. 238 (1983). This is because "the

Maryland Constitution's prohibition against laws authorizing quick-take condemnation merely withdraws from the state the power of quick-take condemnation that, as a sovereign, it would otherwise possess; the prohibition does not, however, bar Maryland from exercising that power when delegated to it by the federal government." Id. (footnotes omitted).

It has also been held that WMATA is "'necessarily exempt from the personnel laws of the signatories.'" Malone v. Washington Metro. Area Transit Auth., 622 F. Supp. 1422, 1428 (E.D. Va. 1985) (citation omitted). In that case, a Virginia plaintiff was denied declaratory relief despite allegations that WMATA's collective bargaining agreement violated Virginia's Right to Work Act, because "the plain language of Section 12(g) exempts WMATA employment policies from all regulation by the signatories." Id. fn9

To like effect is Lucero-Nelson v. Washington Metro. Area Transit Auth., 1 F. Supp. 2d 1, 7 (D.D.C. 1998). In that case, the district court ruled that WMATA was not subject to the D.C. Human Rights Act because, "pursuant to the WMATA Compact, one signatory may not impose its legislative enactment upon the entity created by it without the express consent of the other signatories and of the Congress of the United States." Accord C. T. Hellmuth & Assocs., Inc. v. Washington Metro. Area Transit Auth., 414 F. Supp. 408, 409 (D. Md. 1976) (ruling that the Maryland Public Information Act did not apply to WMATA because "one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories").

Appellant acknowledges these cases, but argues that they merely pertain to whether Maryland can impose a legal duty upon WMATA. He counters with a solitary case, Queen v. Washington Metro. Area Transit Auth., 284 U.S. App. D.C. 29, 901 F.2d 135 (D.C. Cir. 1990), relying on it for the proposition that Maryland law provides a remedy for WMATA's violations of federal law, and that, as a consequence, WMATA is bound to accord its employees the remedy provided by Maryland law. Appellant claims that Queen "establishes beyond dispute that . . . the issue of whether a particular plaintiff has a remedy against WMATA can indeed be answered by Maryland law." Queen does not assist appellant's cause.

In that case, a WMATA employee, while driving a WMATA-owned vehicle, struck Regina Queen while she was walking along the side of the road. WMATA was self-insured for this type of claim. Queen filed suit in federal court in the District of Columbia against the driver and WMATA, as insurer. fn10 The jury returned a verdict in Queen's favor. The issue on appeal was whether Queen could file a direct action against WMATA as the insurer prior to obtaining a judgment against the driver. The United States Court of Appeals for the District of Columbia certified to the Maryland Court of Appeals two questions concerning application of Maryland law to Queen's direct action against WMATA for her tort claims. fn11

Appellant points to the fact that the federal court certified the question of Queen's right to file a direct action against WMATA as insurer, and asserts from that fact the proposition that Maryland law can provide the remedy for suits filed against WMATA. Id. at 138. We do not read Queen to suggest any such thing.

Queen, unlike appellant, filed an action that came within the limited waiver of sovereign immunity set forth in Section 80 of the Compact. Section 80 explicitly states that "the Authority shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws). . . ." (Emphasis supplied.) In other words, WMATA is only subject to state law on those actions for which it has waived immunity. Appellant's cause of action does not fall within that limited waiver.

Finally, for the same reasons as those discussed by the Fourth Circuit in its Lizzi decision, we hold that dismissal of the individual WMATA employee defendants was proper. The Fourth Circuit held in Lizzi that the Eleventh Amendment shields WMATA from appellant's assertions that the agency violated FMLA, 255 F.3d at 132; and the Compact does not waive that immunity from suit, id. at 138. fn12

The Court further held, with regard to the individual defendants in the case, who Lizzi asserts to have been his supervisors, that "WMATA's Eleventh Amendment immunity transferred to the supervisors because the individuals were sued in their official capacities for their official acts." Id. In this latter regard the Fourth Circuit said: "The FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state." Id.

We see no reason not to follow the Fourth Circuit's holding that the individual defendants enjoy the same immunity from suit as does the agency itself in this case.

Indeed, it seems to us that WMATA's sovereign immunity from suit in state court, like its Eleventh Amendment immunity from suit in federal courts, immunizes to the same extent the individual defendants for acts committed within the scope of their official duties. fn13 Certainly, appellant makes no argument to the contrary.

In sum, we hold that the circuit court properly dismissed appellant's lawsuit, in its entirety, because WMATA and the individual appellees are immune under the doctrine of state sovereign immunity from suit on the claims alleged in appellant's complaint.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

Footnotes

fn1 The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted, against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

fn2 Appellant originally cited only Articles 24 and 46 of the Maryland Declaration of Rights in Count III of the second amended complaint. Appellant thereafter filed an amendment by interlineation to add Article 19 to that count.

fn3 Appellees make several arguments in support of the court's dismissal of each of the three counts of appellant's complaint, including that Count III is barred by the

statute of limitations and by res judicata because it was a claim that could have been, but was not, raised in appellant's federal suit. Our resolution of this appeal does not require us to address all of the arguments pressed by appellees, so we do not address them.

fn4 Although we do not reach the question of whether the Fourth Circuit's decision in Lizzi is res judicata, we point out that Eleventh Amendment immunity is not synonymous with the broader doctrine of sovereign immunity, but is instead a manifestation of it. See Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 753, 152 L. Ed. 2d 962, 122 S. Ct. 1864 (2002) ("The Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."); see also Alden v. Maine, 527 U.S. 706, 728, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999) ("Sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.").

fn5 Hereinafter, unless otherwise stated, all references to the Code are to the Transportation Article (2001 Repl. Vol.).

fn6 The United States Court of Appeals for the District of Columbia has held that hiring and firing decisions are not proprietary: "Although employment decisions are not quintessential governmental functions . . . 'decisions concerning the hiring, training, and supervising of WMATA employees are discretionary in nature, and thus immune from judicial review.'" Beebe v. Washington Metro. Area Transit Auth., 327 U.S. App. D.C. 171, 129 F.3d 1283, 1287 (D.C. Cir. 1997) (quoting Burkhart v. Washington Metro. Area Transit Auth., 324 U.S. App.

D.C. 241, 112 F.3d 1207, 1217 (D.C. Cir. 1997)). The Fourth Circuit has likewise declared in its Lizzi opinion that "hiring, training, and supervision practices are governmental functions." 255 F.3d 128, 138 (4th Cir. 2001), cert. denied sub nom. Lizzi v. Washington Metro. Area Transit Auth., 534 U.S. 1081, 151 L. Ed. 2d 697, 122 S. Ct. 812 (2002).

The court also noted in Lizzi: "There is no contention that the exercise of authority at issue in this suit was in any sense a tort or a contract 'committed in the conduct of any proprietary function." Id. at 133.

fn7 Appellant does not allege that his termination was in violation of any bargaining agreement with WMATA. In any case, as appellees explained in their motion to dismiss the second amended complaint, appellant, as a union employee, would have been required to submit to final and binding arbitration of such an employment grievance. See Sanders v. Washington Metro. Area Transit Auth., 260 U.S. App. D.C. 359, 819 F.2d 1151, 1156-57 (D.C. Cir. 1987); see also Robinson v. Bunch, 367 Md. 432, 446-47, 788 A.2d 636 (2002) (holding that failure to exhaust administrative remedies entitles agency to dismissal of cause of action).

fn8 Hess involved the nonapplicability of the Eleventh Amendment to the Port Authority of New York and New Jersey. The Court specifically distinguished the Port Authority from WMATA, citing with approval the statement in Morris v. Washington Metro. Area Transit Auth., 251 U.S. App. D.C. 42, 781 F.2d 218, 227 (D.C. Cir. 1986), that "'where an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense

and the rationale of the eleventh amendment require that sovereign immunity attached to the agency.'" Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 49, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994).

fn9 Section 12(g) of the Compact provides that WMATA may:

create and abolish offices, employments and positions (other than those specifically provided for herein) as it deems necessary for the purposes of the Authority, and fix and provide for the qualification, appointment, removal, term, tenure, compensation, pension and retirement rights of its officers and employees without regard to the law of any of the signatories.

fn10 WMATA had previously obtained a declaratory judgment of nonliability in a Maryland circuit court. Queen v. Washington Metro. Area Transit Auth., 284 U.S. App. D.C. 29, 901 F.2d 135, 136 (D.C. Cir. 1990). The circuit court ruled that WMATA was not liable for the accident under the theory of respondent superior because the driver was acting outside the scope of his duties at the time of the accident. Id. at 137.

fn11 The Court of Appeals answered the certified questions in Washington Metro. Area Transit Auth. v. Queen, 324 Md. 326, 597 A.2d 423 (1991).

fn12 The Fourth Circuit also held that FMLA does not validly abrogate a state's Eleventh Amendment immunity. Lizzi, 255 F.3d at 138.

fn13 When this issue was raised at the hearing on the motion to dismiss, appellant was unable to direct the circuit court to where in his complaint he had alleged that

the individual defendants were acting outside the scope of their official capacities with respect to the events leading up to appellant's termination.

CIVIL ACTION LAW
LAW NO. 99-19586

CHRISTOPHER LIZZI,
Plaintiff,

vs.

WASHINGTON METROPOLITAN
TRANSIT AUTHORITY,
Defendant.

REPORTER'S OFFICIAL
TRANSCRIPT OF PROCEEDINGS
(MOTIONS HEARING)

Upper Marlboro, Maryland
January 4, 2002

BEFORE: HONORABLE MICHELE D. HOTTEN,
Associate Judge

APPEARANCES:
For the Plaintiff:
PAUL F. EVELIUS, ESQUIRE

For the Defendant:
GERARD J. STIEF, ESQUIRE

JANE M. SMITH
Official Court Reporter P.O. Box 401
Upper Marlboro, Maryland 20773

PROCEEDINGS
(10:00 A.M.)

THE DEPUTY CLERK: CAL 99-19586, Lizzi versus Washington Metropolitan Transit Authority.

MR. STIEF: Good morning, Your Honor. Gerard Stief for the Defendant, WAMTA.

MR. EVELIUS: Paul Evelius for Plaintiff, Christopher Lizzi. Good morning, Your Honor.

THE COURT: We are on Defendant's motion to lift stay and dismiss the entire action?

MR. STIEF: That is correct, Your Honor. We were before the Court approximately a year ago, I think it was a year ago this month, on the Motion to Dismiss, which the Court stayed.

THE COURT: On January 26.

MR. STIEF: Okay. Thank you. Which the Court stayed at the time because of the pendency in the Fourth Circuit Court of the main action in this case.

This case stems from the termination of the Plaintiff as a Metro wheelchair lift mechanic, whose claim is based on the Family Medical Leave Act, and went through the federal court system. When we were here the last time we were awaiting rulings, I believe, from the --

THE COURT: Fourth Circuit.

MR. STIFF: We were awaiting a' ruling from the Fourth Circuit. Precisely.

And the Fourth Circuit in June of this year came down

with a decision saying that both WMATA and the individual Defendants had immunity from the cause of action. There is nothing left to protect in this case, Your Honor, and the case calls for dismissal at this time.

Plaintiff's brief opposition briefly mentions the fact that there is a pending sur-petition on the Fourth Circuit.

Ironically, according to the internet, the Supreme Court will take it up today at a conference that was scheduled for January 4. But that should not affect the Court's dismissal at this time of the case.

Plaintiff has had his appeal. His appeal is ripe to the Fourth Circuit Supreme Court action. And, of course, it is totally discretionary for the one-in-a-thousand shot to get anything like that granted.

There is nothing left to protect in this Court. Because in the immunity issue the Defendants are immune in this Court, as well as they or anyone else.

More importantly, the Maryland Court of Appeals, in the Alvey case, which is cited in the papers that we have, talk in terms of the Plaintiff cannot just keep filing piecemeal in different courts. He was required to present any arguments he may have when he first filed the case, which was the federal court case. There is nothing left to protect in this Court.

Even if the one-in-a-thousand-shot came through for the Plaintiff, and the Supreme Court did grant review in this case, the simple issue would be whether or not Fourth Circuit was correct. So, consequently, the case should be dismissed at this time.

I'll note that I was handed by Counsel for Plaintiff another Amended Complaint this morning. It basically adds absolutely nothing to what already is before the Court.

There is a third count, a Maryland Constitutional claim, but it simply talks in terms of being deprived of his rights, which go back to the Family Medical Leave Act. The State calls for dismissal now. And we respectfully request our motion to lift the stay be granted and let the case be dismissed in its entirety.

THE COURT: When was that filed?

MR. EVELIUS: I filed it today, Your Honor.

THE COURT: Oh. Okay.

MR. EVELIUS: Good morning, Your Honor. To clarify, the reason that I filed a suit on behalf of my client in the state court was, as other courts have recognized, it was a protective suit in state court in case the federal court ruled that there was no subject matter jurisdiction in the federal court, and so that I wouldn't have a limitations problem if I then later filed here. Okay. Now, Your Honor, at this point, fortunately, or unfortunately, the issue is whether or not the federal court has subject matter jurisdiction over this case if it is not resolved. That is for the Supreme Court of the United State to decide today in part by virtue of the Court's conference. But I, most importantly for purposes of this motion, you see in the Defendant's brief indications of claims of res judicata. Perhaps the most important thing, Your Honor, is what the Fourth Circuit said. The Fourth Circuit, at the end of its opinion, indicated quite clearly what this

was about. It is dismissed for lack of subject matter jurisdiction. That is all it did.

And subject matter jurisdiction, as I have cited in numerous cases in the motion which we had filed before, in the response we had filed on November 3 of 2000, the Fourth Circuit itself has indicated that the Eleventh Amendment demands a withdrawal of jurisdiction and that effectively confirms immunity in federal court.

That is all that the Fourth Circuit said, Your Honor in this case. And at the very end of the opinion it says: This case must be dismissed for lack of subject matter jurisdiction.

Given that, Your Honor, the issue -And this dovetails with the issue raised by Defendants in their motion to dismiss, and that is the motion based on res judicata, that is the crux of their motion.

There needs, under the Alvey case -- the very case which Mr. Stief just talked about -- which discusses the element of res judicata. One of which is a decision on the merits. And all this was, Your Honor, in federal court was a dismissal for lack of subject matter jurisdiction.

So, in other words, Your Honor, this Court has jurisdiction over this case. There is no question that this Court has subject matter jurisdiction over cases against WAMTA.

And so the Fourth Circuit has addressed this. Obviously it can't address whether this Court has subject matter jurisdiction, it only addressed whether the federal court has jurisdiction over cases against WAMTA.

And the same thing goes with respect to the individual supervisors, Your Honor, who were sued. And if you note in the Fourth Circuit's opinion in dismissing the individuals it says: The state would -- If we could sue them. It says if Plaintiff sues "the state would still suffer the indignity of having each discrete decision regarding personnel or organizational matters subject to second-guessing by a federal court. And the real interests served by the Eleventh Amendment--" Your Honor, it is definitional. " -- are not to be sacrificed to elementary mechanics of captions and pleadings."

And that is what the Fourth Circuit considered subject matter jurisdiction.

And it is elementary Hornbook law, recognized by the Fourth Circuit expressly in the case I cited, that all that is is a dismissal, not on the merits, without prejudice to the claim brought here.

And, Your Honor, in addition, waiting until the court has jurisdiction, regardless of what the Supreme Court does, obviously, I filed the initial Complaint in federal court. And given that the Supreme Court needs to decide this, and we are going to know something I guess on Monday about that, I mean the case should remain in effect at least until Monday.

But after that, even, if the Supreme Court did not grant the certiorari, this Court still has subject matter jurisdiction over this case.

Thank you, Your Honor.

MR. STIFF: Your Honor, briefly in rebuttal.

The Fourth Circuit's decision -- and I am quoting here, and this is attached to the pleading that we filed here -- at 255 Fed. 3d, page 128, talks in terms: "Because sovereign immunity extends to WMATA, and because the claims against WMATA employees are in reality claims against the agency itself, we affirm in part, reverse in part, and remand with directions to dismiss the action."

In other words, dismissal of the whole case.

Again, in their final paragraph on page 138 of the decision there they talk about "The FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state." The Supreme Court in Alden versus Maine in 1999 --

And this is discussed at pages 7 and 8 of our earlier Motion to Dismiss, which is attached as Exhibit B to motion to lift the stay.

The Supreme Court in Alvey versus Maine referred to: "The States' immunity from suit as the 'Eleventh Amendment immunity' is convenient shorthand, but indeed is a misnomer, because the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment."

More importantly, the Supreme Court in Alden versus Maine -- this was an FLSA case, of which the FMLA case is a very close parallel to what we have here -- said that Congress did not have the power, even under Article 1, to abrogate a State's immunity from private suit in its own courts.

Which is the exact situation we have here.

The Supreme Court answers this in Alden versus Maine in 1999. The case cries out for dismissal and to be taken off the Court's docket. And, more importantly, to remove the case against the Defendant.

So we ask that the motion be granted.

THE COURT: May I see a copy of the Amended Complaint which was filed this morning?

MR. EVELIUS: Yes, Your Honor.

May I briefly respond to what he just said?

THE COURT: Sure.

MR. EVELIUS: The first thing is in the Court's concluding paragraph Mr. Stief did not mention what the Court said, what I mentioned before. It was dismissed for lack of subject matter jurisdiction.

It is true, Your Honor, that the Eleventh Amendment is an aspect of sovereign immunity. Okay. But dismissing on an Eleventh Amendment grounds by a federal court, as the Fourth Circuit expressly said in this case, is a withdrawal of jurisdiction. And it infers an immunity from suit in federal court. Now, with respect to the Alden case. The Alden case, Your Honor, if you read through the opinion, the case initially went up through the federal court system. And the federal court in that case said there is no jurisdiction there. There is no subject matter jurisdiction because of the Eleventh Amendment. Then the case went back in the state court.

What is different between WAMTA and the State of Maine case is you'll notice that WAMTA is an Interstate Compact agency. There are provisions in the WAMTA contract that expressly states that they can sue and be sued. And it also states that the state courts of Maryland, Virginia and the District of Columbia have jurisdiction over cases against WAMTA.

And, Your Honor, I am going to also point out a case that is not cited in the brief. But there is a U.S.C. case that came down years ago in which a Section 1983 federal claim was brought against WAMTA. And a judge in the Federal District Court in D.C., what he basically said was we do not have jurisdiction here, but we are going to remand the case to the state court, to the Superior Court of D.C., which was the jurisdiction there. And the Plaintiff can pursue his Federal Section 1983 claim there.

This case is just like that. That case, Your Honor, is Keenan versus WMATA, 643 Fed. Supp. at 324.

And so, Your Honor, what the Fourth Circuit has ruled on here -- and they expressly say it -- is that this was a dismissal for lack of subject matter jurisdiction.

And I might add, Your Honor, knowing that Mr. Stief has said regarding the Alden case that that case addresses the individual Defendants in the claim that was added this morning, Your Honor, --

And it will bear addressing more in going forward.

But as a constitutional claim the individuals do not have immunity. The Court of Appeals of Maryland has recognized that individual defendants do not have

immunity from suit as brought under the Maryland Constitution.

So, Your Honor, again I would submit that, again, the case should continue, and that this Court most definitely has subject matter jurisdiction. And all the Fourth Circuit said was there is no subject matter jurisdiction over WMATA or its individual agents.

THE COURT: If you all keep standing I'll never get to read the Amended Complaint.

MR. STIEF: I'll sit down.

THE COURT: Thank you.

Excuse me, gentlemen. I need my Maryland Declaration of Rights.

Go ahead.

MR. STIEF: Just a couple of points rebutting what counsel for Plaintiff has said. First of all, Alvey versus Alvey. The Maryland Court of Appeals made clear that the doctrine of res judicata -- and we are now, because the individual defendants are now -- we are really talking res judicata from WMATA and the individual defendants.

And, consequently, Alvey says that "a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only to all matters that have been decided in the original suit, but as to all matters by which it could have been litigated in the first suit."

Plaintiff is trying to resurrect the claim as Constitutional. There is no predicate. He passed out the Constitutional claim based on FMLA, which was rejected by the Fourth Circuit.

He put himself in a box if it is the same cause of action. Alvey compels dismissal of the case.

The Plaintiff is contending it is somehow a new cause of action. It is, timewise, because the offered facts were in 1997 and wouldn't relate back. But the Court needs to go that far back to look at it.

The Fourth Circuit has ruled upon this issue. And the Compact and waiver were precisely on the basis. And the Court should dismiss it on the fact that the Fourth Circuit has dismissed it.

THE COURT: What about the Maryland constitutional defense claim?

MR. STIEF: The Maryland

THE COURT: That the Fourth Circuit would not have that one.

MR. STIEF: The Plaintiff did not present them in the federal case, that is correct. But just from a brief looking at this And I only got it this morning. I was given it here in the courtroom as well.

Just talking in terms of by depriving -- talking about paragraph 23 -- by depriving plaintiff of rights provided by federal and state law. Well, that is what the FMLA which was rejected.

So there is no independent constitutional claims, and there is no statutory vehicle for implementing the constitutional claim. But, more importantly, the Plaintiff's claim could have been raised in the federal court action.

It was not raised under Alvey. It is too late to start over on the same argument trying to overturn his termination. It is too late. He should have raised it in federal court, as Alvey compels.

MR. EVELIUS: Very briefly, Your Honor?

THE COURT: Yes.

MR. EVELIUS: This is where Mr. Stief was talking about the Maryland Court of Appeals res judicata law. A case that also applies is FWB Bank versus Richman -- it is 354 Md., 472, -- which states: "If res judicata applies, among other things there must have been a valid and final judgment on the merits by a court of competent jurisdiction." And it goes on.

And in another case, Annapolis Urban Renewal Authority vs. Interlink, Inc., 43 Maryland App., 286, even more precisely states where judgment is based on lack of subject matter jurisdiction or lack of jurisdiction under the doctrine of res judicata has only limited application. It only goes to the precise issue.

The precise issue is the federal court issue in the federal Court case whether the court had federal jurisdiction in this case.

If I won the FMLA, then Mr. Stief said there is no statutory vehicle. That is correct. Then you have the

statute for implementing claims. And it is a Maryland common law claim under the cases of Ritchie v. Donnelly and the case of Widgeon, and numerous other Court of Appeals cases which have come down over the years saying there is a common law claim under the Maryland Constitution which otherwise has to do with asserting your rights under common law in court to protect them as a private individual.

And it has religiously made that claim on numerous occasions.

And the anchor of that is both the FMLA and deprivation of contract rights without due process that were brought about by the fact that independent of the FMLA case that WMATA itself adopted policies that regarded leave, whether they want to call it FMLA, as a matter of contract and it became a contract.

And so, Your Honor, the bottom line very simply is there has been no judgment on the merits of this case in federal court, it is only dismissal of lack of subject matter jurisdiction. The motion should be denied.

Thank you, Your Honor.

THE COURT: It has been brought to the Court's attention that the Plaintiff has filed an Amended Complaint with the Clerk's office this morning which adds Count 3, a violation of his rights under the Maryland Constitution.

The other two counts are as follows: Count 1, an FMLA claim against each Defendant and, Count 2, a breach of contract claim.

In addition to the pleadings that the Court reviewed, and the case law that was presented, the parties also brought to the Court's attention the Fourth Circuit decision relative to the federal case which the Plaintiff brought against the Defendant, which is based on very similar, if not identical, assertions. And the Court has had an opportunity to review that.

Upon consideration of the pleadings and the arguments that have been presented and the case law the Defendant's motion to lift the stay is granted.

The Defendant's motion to dismiss the Complaint is granted in part, to wit: it is granted as to Count 1 and Count 2 under the theory of res judicata, but is denied as to Count 3 of the Amended Complaint related to the Maryland constitutional claims.

Mr. Evelius, here is your copy of the Amended Complaint.

MR. EVELIUS: Thank you, Your Honor. Thank you for your time.

MR. STIEF: Your Honor, could I just ask for a clarification on the record of one thing. We were just served this morning with that, and I intended to file a Motion to Dismiss. I just want the record to reflect the fact that we haven't had the opportunity to research Count 3, and that I have the right to file a Motion to Dismiss on that decision.

THE COURT: You can.

I just wanted the record to be clear that it was presented

to the Court. And I have to consider that, I think, as part of my decision. But you are free to file a specific motion to dismiss as to that count.

MR. STIEF: Thank you, Your Honor.

MR. EVELIUS: Thank you, Your Honor.

(Whereupon, proceedings in this matter were concluded at 10:25 a.m.)

(* * * * * * * * * *

CIVIL ACTION LAW
LAW NO. 99-19586

CHRISTOPHER LIZZI,
Plaintiff,

vs.

WASHINGTON METROPOLITAN
TRANSIT AUTHORITY,
Defendant.

REPORTER'S OFFICIAL
TRANSCRIPT OF PROCEEDINGS
(Motion to Dismiss)

Upper Marlboro, Maryland Friday,
March 29, 2002

BEFORE: HONORABLE WILLIAM B. SPELLBRING JR., Associate Judge

APPEARANCES:
For the Plaintiff:
PAUL F. EVELIUS, ESQ.

For the Defendants:
GERARD J. STIEF, ESQ.

PHYLLIS HERNANDEZ,
RPR Official Court Reporter
P.O. Box 401
Upper Marlboro, MD 20773

PROCEEDINGS

THE DEPUTY CLERK: Civil Action Law 99-19536, Lizzi vs. WMATA.

THE COURT: Counsel, identify yourself for the record.

MR. STIEF: Good morning, Your Honor. Gerard Stief for Defendants, WMATA, Alexander, Thomas, Wallace, Johnson, McCoy and O'Donnell.

MR. EVELIUS: Good morning, Your Honor. I'm Paul Evelius on behalf of Plaintiff Lizzi.

THE COURT: Okay. Now, this is WMATA's motion to dismiss Count III of the complaint or in the alternative to strike the complaint.

MR. STIEF: That's correct, Your Honor.

THE COURT: And among your arguments is the argument that the matter was litigated before Judge Chasanow in the United States District Court for Maryland, which decision was then appealed to the Fourth Circuit who affirmed Judge Chasanow with respect to WMATA, reversed Judge Chasanow with respect to the individual Defendants, thereby dismissing all the Defendants, and that consequently, the only remaining count before me, which is a Maryland Declaration of Rights claim, could have been brought in federal court, wasn't brought in federal court, and consequently, under Alvey and the cases subsequent to Alvey, is precluded here.

That's among your arguments?

MR. STIEF: That's correct. Among my arguments. Your Honor just stated them perfectly.

THE COURT: I don't need to hear from you.

Tell me why I shouldn't grant them --

MR. EVELIUS: Certainly. Reason Number 1 and, centrally, as I indicated in the memo the other day, could have been, might have been litigated is essentially an element of res judicata in not only Alvey, but also in the federal cases governing res judicata which really are the ones that apply here.

The Maryland Court of Appeals in the Kent case that I cited said that federal res judicata law controls as to whether or not a federal judgment has res judicata effect.

THE COURT: Are you suggesting that you could have filed the claim under the Family Leave Act here and there as you did and only the Maryland constitutional claims here, --

MR. EVELIUS: I could have.

THE COURT: -- litigated it, did apparently, litigated the case in the federal court, lose, and then come back here and try the case here?

MR. EVELIUS: No. It would depend, Your Honor. If the case had actually gone to trial in federal court and I lost on the merits at a jury trial, most likely, Your Honor, I would be barred from litigating something that arose out of the same facts here. That would be crazy for me to argue that I would get two shots at the same facts. But a

couple of things are at issue here, Your Honor.

First of All, Fourth Circuit expressly stated, Judge Wilkinson who I might disagree with, but certainly knows what subject matter jurisdiction is, he entered a ruling that said, that this case must be dismissed for lack of subject matter jurisdiction.

THE COURT: Because the Eleventh Amendment grants immunity to the Defendants.

MR. EVELIUS: But the Eleventh Amendment immunity and the Fourth Circuit has held and the courts throughout the country that is recognized --

THE COURT: Wasn't that the basis of the Fourth Circuit's ruling, that these Defendants are immune from suit for these actions?

MR. EVELIUS: In federal court, Your Honor. In federal court they said dismissed for lack of subject matter jurisdiction. The court that dismisses for a lack of subject matter jurisdiction, Your Honor, can't address the merits. It's dismissed on a jurisdictional basis.

THE COURT: That jurisdiction being they are immune.

MR. EVELIUS: No. That jurisdiction being a federal jurisdiction. An Eleventh Amendment -- this is a sovereign immunity ruling they are relying on, Your Honor. But the sovereign immunity act, that relates to the federal courts which are the courts of limited jurisdiction. This goes into all the federal decisions that have come out recently. The federal court in the Robinson case, in the Alden case, those courts -- federal courts

dismissed, a plaintiff went to state court. Those cases weren't dismissed on res judicata grounds on the state court. The only thing that I haven't mentioned is --

THE COURT: Didn't the Fourth Circuit find that these Defendants are immune?

MR. EVELIUS: From suit in federal court, yes. Absolutely.

THE COURT: Well, are you saying that the immunity that they found was an Eleventh Amendment immunity based on sovereign immunity, right?

MR. EVELIUS: No. That's not the way I would phrase it. I would say that, generally speaking, the State has immunity from suit in state or federal court, as a general rule, leaving aside statutes, whatever. But the states can waive immunity in state court without waiving immunity in federal court. And that's what often happens.

In various cases that I cited, Your Honor, the state waived sovereign immunity in state court, but a plaintiff sued in federal court. And the federal court said, including the Supreme Court, just because a state waives immunity in state court doesn't mean it's waived Eleventh Amendment immunity.

There's something else I have to say regarding state law claims. I could not have brought the state law claims in federal court. I could not have done that, because the Supreme Court has said in the Pennhurst case that a plaintiff cannot bring against the state state law claims in federal court even if he's bringing in federal court federal law claims.

And in addition to that, going right along with it, Your Honor, the courts have also held -- and the authorities I cite -- that in that case, a federal court judgment is not res judicata as to the state law claims because the plaintiff couldn't have brought them together.

THE COURT: Do you contend that the state constitutional claims grow out of the same operative facts that the Family Medical Leave claim grows out of?

MR. EVELIUS: Yes. Absolutely. Absolutely. And as I said, Your Honor --

THE COURT: So if there's immunity for that, there's immunity for the state law claim.

MR. EVELIUS: No.

THE COURT: Why not?

MR. EVELIUS: Because, Your Honor, first of all, it has to do -- and this is a complex myriad of law, but in the end, it is very simple. It has to do with the nature of the federalism system. Federal law claims -- and the Supreme Court has said this in the Pennhurst case -federal law claims, if a federal court litigates federal law claims in state court, it cannot, it cannot litigate state law claims in state court -okay -- in federal court. I'm sorry.

And in addition to that, the court has held that -- the courts have held that in that situation, in that unusual situation, the plaintiff indeed may have to split his claims. In other words, go for part of the claims in federal court and part of the claims in state court. And because the plaintiff is forced to do that in that scenario, the plaintiff

is not barred by res judicata in state court as to those claims.

And, Your Honor, another thing I haven't mentioned is Maryland Rule 1-101 addresses this. I cited this in one of the briefs filed in 2000. Maryland -- it takes that into account. It says that. "If an action is filed in a U.S. District Court or another state within the period of limitations prescribed by Maryland law and the foreign court enters an order of dismissal for lack of jurisdiction, because the court declines to exercise jurisdiction, or because the action is barred by limitations, an action filed in this State court within 30 days shall be treated as timely filed." So the drafters of the Maryland rules recognized and accommodated this type of situation.

But as I had said, independent of all of that, what this basically is is a dismissal in federal court for lack of subject matter jurisdiction. And the reason the federal court had to dismiss for lack of subject matter jurisdiction had to do with sovereign immunity, but only that aspect of sovereign immunity which deprives the federal courts of litigation.

Otherwise, if it was broader, Judge Wilkinson and the Fourth Circuit would have said the Plaintiff's claims are dismissed with prejudice. But what Judge Wilkinson said, the claims are dismissed for lack of subject matter jurisdiction. And under Rule 441 of the Federal Rules of Civil Procedure, it expressly states that any rulings are dismissals with prejudice other than dismissals for lack of jurisdiction.

So, Your Honor, with respect to Judge Chasanow, Judge Chasanow at the federal court level, she said on the

merits that there should be a trial on these things. I know that's not relevant necessarily.

THE COURT: Let me ask you this. The Fourth Circuit says that the individual Defendants, all you claim they are being sued in their individual capacity, are actually being sued in their official capacity, correct?

MR. EVELIUS: True.

THE COURT: Which is why they were dismissed. Is there any reason why I should revisit that rule?

MR. EVELIUS: Yes, Your Honor, because of the Ritchie case mainly and the Court of Appeals which says, which Maryland courts don't recognize that distinction, and it expressly distinguished the federal law and said we don't care what federal law says. We here in Maryland, we will hold public officials liable for their conduct if

THE COURT: Let me make it real clear.

MR. EVELIUS: Okay.

THE COURT: Where in your complaint is the cause of action pled against Mr. Thomas, Mr. Johnson, or Mr. Wallace?

MR. EVELIUS: Where in the complaint?

THE COURT: Yes.

MR. EVELIUS: Because I named them as -- I named them as --

THE COURT: And you never mention them in the body of the complaint. They are named --

MR. EVELIUS: Well, I say Defendants. I say Defendants. I mean, I don't want to repeat their names every time.

THE COURT: Well, you did with Mr. Alexander. You did with Mr. Kurtz. You did with Mr. McCoy, and you did with Dr. O'Donnell.

MR. EVELIUS: Oh, I'm sorry, Your Honor. I misspoke, Your Honor. I'm sorry. Could you name the ones that --

THE COURT: Yes. Thomas, Johnson, Wallace -- where in your pleadings do they do anything?

MR. EVELIUS: Well, where they did something, Your Honor -- if I didn't mention that, we have gone through discovery in this case. We have responded on the merits to summary judgment motion. And I will agree, even though Mr. Stief, my brother counsel and I have not discussed it, I would agree not completely, because Mr. Thomas' name did come up in discovery.

THE COURT: What I want you to do is go back to the document that's in front of me --

MR. EVELIUS: Sure.

THE COURT: -- and show me what you have pled against Mr. Thomas, Mr. Johnson or Mr. Wallace.

MR. EVELIUS: Your Honor, other than saying that they -- first of all, from a good faith basis, I didn't mention

them after Paragraph 6 other than by referring to them in the collective. I mean, there is no -- I'm not going to deny what the paper says. But at the same time, Your Honor, Mr. Johnson was one of the -there were various levels of chains of command. He was one of the supervisors of Plaintiff Lizzi. Mr. Wallace was further up the chain, and Mr. Thomas was yet further up the chain.

Now, I may not have been more specific, there is no question, with respect to certain Defendants than others. But there was no motion filed at any time, Your Honor, saying, well, with respect to these Defendants -- because certainly in discovery in the response on merits to the summary judgment motion, I named people. And there has never been any ruling that somebody wasn't involved enough. That's all I am saying.

In fairness, Your Honor, you are absolutely right that the complaint itself is more specific. But isn't that the province of a motion for more definite statement, if anything?

THE COURT: Isn't that the basis under which your whole claim is established? You can't file a three-count complaint and say, you know, actually I am really suing on intentional infliction of emotional stress. I know I didn't plead it.

MR. EVELIUS: Oh, no.

THE COURT: But that's what I'd like to proceed on. Aren't you limited to what's in your complaint? Isn't that the whole basis from which an indictment in a criminal case and complaint in the civil case?

MR. EVELIUS: Absolutely, Your Honor.

THE COURT: So what's alleged against Mr. Thomas, Mr. Johnson, or Mr. Wallace?

MR. EVELIUS: What's alleged generally in this complaint.

THE COURT: What is alleged specifically against Mr. Thomas, Mr. Johnson, Mr. Wallace?

MR. EVELIUS: That they were supervisory

THE COURT: Where?

MR. EVELIUS: That they were employees.

THE COURT: Read to me the paragraph number.

MR. EVELIUS: Paragraph 6. Well, first, the introductory paragraph in the complaint refers to them. Okay. And then, in addition, Paragraph 6.

THE COURT: Says they were employees of WMATA.

MR. EVELIUS: Employees of WMATA. They had been employers. Subject Defendants in Paragraph 7 -- Defendants have been employers subject to the provisions of the FMLA.

THE COURT: So then you are pleading against them in their official capacity, aren't you?

MR. EVELIUS: No, Your Honor. And there's a definitional issue here. That term official capacity can

mean different things in different areas of the law when you get right down to it.

THE COURT: What's before me is Maryland constitutional claims. That's the only reason we are here.

MR. EVELIUS: Today you are absolutely right about that, Your Honor. And the Maryland Court of Appeals in the Ritchie case and in other cases has held that defendants individually, and it was very express, Your Honor, very broadly said, well, even if they are in their official capacity, even if they do things in that situation, we are holding these gentlemen liable.

And, Your Honor, I have to say with all the federalism decisions that have come down, one of the main thrusts of those decisions, Your Honor, from the Supreme Court is the notion that states should deal with -- what the Supreme Court deals as State law problems. And that's why, especially in this situation, we have to listen to what the Court of Appeals in Maryland says. Because the State of Maryland and in the realm of federalism, that's the emphasis of these decisions, has the right to decide how Maryland is going to apply Maryland law.

And that's why the Supreme Court in Pennhurst, Your Honor, said you cannot bring these claims in federal court. We don't even want to hear them. And the Court of Appeals of Maryland said, if someone can't go into federal court and they violated federal law, and they can't go into federal court, we are going to hear that claim here. And to boot, the individuals who violate that law, and when it becomes a constitutional violation, which it is, in that situation, they are going to be held individually liable regardless of whether in federal court.

So I was, Your Honor, dismayed of course from what I got from the Fourth Circuit in way of the federalism ruling because, you know, it through me out of one court. But at the same time, that same notion of federalism entitles my clients to be here.

THE COURT: I haven't ruled that yet.

MR. EVELIUS: Say that again.

THE COURT: I haven't ruled that yet.

MR. EVELIUS: I understand that, Your Honor. I am simply arguing.

THE COURT: I understand.

MR. EVELIUS: I didn't mean to be presumptuous.

THE COURT: Go ahead. I interrupted you.

MR. EVELIUS: Okay. And so, Your Honor, I guess in some ways, Your Honor, there is no way to argue. But I guess whatever questions you have, you know, I'm trying to answer them because I realize that there are various issues that come up in these federalism cases. But I would also submit that I can answer them and that my arguments are consistent.

Your Honor, going to some of the other arguments that the Defendants have raised, one of them has to do with personal jurisdiction. The Defendants' answer --

THE COURT: I don't need to hear from you on that.

MR. EVELIUS: Okay. Another one was whether or not the amended complaint was filed timely. Your Honor, first of all, it is not timely filed. Unlike in the other case you heard a few moments ago, there was no deadline for filing amended complaints. The Court of Special Appeals, I believe it is in two recent cases, if not more, reversed for abuses of discretion cases in which judges dismissed amended complaints or struck amended complaints when there wasn't a trial date set, and when there was no prejudice and said that you have to afford great liberality to the filing of amended complaints. And so on that grounds, Your Honor, the complaint should not be struck I would respectfully submit.

There is also a limitations argument set forth in the Defendants' papers. And that again, Your Honor, is not a meritorious argument for the reason that, as Your Honor said before, this all arose out of an identical facts situation, and it's perfectly consistent for me to say that, you know, and I have a lot of Maryland case law on my side that I have cited in terms of whether or not a complaint relates back.

I am happy to address any questions that the Court might have in that regard. But I would just, I guess, generally speaking, respectfully submit to Your Honor that the federal courts dismissal for lack of subject matter jurisdiction does not have any res judicata effect on the Plaintiff's state law claim. Under especially the Pennhurst case and the Restatement (Second) of Judgments, Section 25 where it says, "If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground, then a second action in a competent court presenting the omitted theory or ground should be held not precluded."

And the Maryland appellate courts on various occasions have looked to the restatement section in applying res judicata law. And then I cite a case applying that from Texas, which I think supports that reasoning. So I guess, Your Honor, unless Your Honor has further questions of me

THE COURT: No, sir.

MR. EVELIUS: -- I will thank you, Your Honor.

THE COURT: Mr. Stief, as I understand, a portion of Plaintiff's argument is that the Maryland Declaration of Rights claim could not be brought in federal court. What's your position on that?

MR. STIEF: That's slightly wrong, Your Honor. Section 81 of the WAMATA Compact gives concurrent, and that's set forth in the text of the Fourth Circuit decision if you need it. Somewhere in the record it sets forth concurrent jurisdiction for the state and federal courts -- other cases involving WMATA. Plaintiff chose to go the Fourth Circuit or federal court route.

THE COURT: Well, that's as to general claims. But his position, as I understand it, is that the federal courts will not hear Maryland Declaration of Rights claims. No jurisdiction.

Is that your argument?

MR. EVELIUS: That's one of my arguments. Yes, Your Honor.

MR. STIEF: And that's absolutely incorrect both under-

Section 81 of the Compact and also under 28 U.S.C. Section 1367. Now, Plaintiff switched again in the reply to the reply which he filed just the other day. But the answer to that, besides Section 81 is 28 U.S.C., 1367, which specifically gives the federal courts supplemental jurisdiction over claims that are so related to claims in the action. Mr. Evelius is here saying, oh, these are out of the same claims. All of these arguments we heard almost a year ago to the date down in Richmond. Pennhurst, Fourth Circuit went off of them in their decision.

Pennhurst does not state what the Plaintiff is contending that it does. The real answer is in Alden vs. Maine. I devoted two pages of this, Pages 5 and 6 of my initial motion here before Your Honor. Alden vs. Maine, the Supreme Court made absolutely clear that although the courts presently use Eleventh Amendment -- and this was an FSLA claim in FMLA as a subset of it, so it is really directly on point -- for purposes of immunity, the states, including WMATA, has a broader sovereign immunity. Eleventh Amendment immunity is a small subset of that.

What the Fourth Circuit is holding is that WMATA and its individuals are immune from the sovereign immunity. It's not limited to whether or not you could go into just federal versus state court. This is not a situation like where someone wrote a monetary claim against the United States and inadvertently filed the suit in U.S. District Court and the government comes in and says, oh, all these type claims have to be brought in the Court of Federal Claims.

That is the type of situation that Mr. Evelius is trying to bring over to this case. That is not the case here. Because

of Section 81, because of 28 U.S.C., and particularly because of Alden vs. Maine immunity has been found. The Defendants are entitled to rely on the Fourth Circuit immunity. It comes over to this particular case.

The Plaintiff clearly could have attempted to raise these issues at the state constitutional, although for the reasons we set forth in the papers, the immunity applies to that as well, but he could have raised that and failed to do so in the district court.

Both federal law, Fourth Circuit precedent, and the precedents of Maryland Court of Appeals cautions strongly against piecemeal litigation -- trying to pick and choose forums. The Plaintiff had the opportunity to raise all these arguments in federal court. He failed to do so and immunity controls. The case should be dismissed now, Your Honor.

MR. EVELIUS: May I?

THE COURT: Yes, sir. Go ahead.

MR. EVELIUS: Yes. On each one of those points -- I'm sort of in the same order -- Mr. Stief went to 28 U.S.C. 1367, which is basically somewhat a recent federal codification of something called pendent jurisdiction, when you can bring claims in federal court. You can bring state claims in federal court in certain situations if they arise out of the same core of operative facts.

But in the Pennhurst case, the Supreme Court expressly said -- and in a later case, City of Chicago vs. International that I cited, and the Supreme Court in Pennhurst -- "the Court held it would violate the

Eleventh Amendment for a federal court to entertain, without the State's consent, a claim that state officials violated state law in carrying out their official responsibilities. The Court further held that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction." I couldn't have brought those claims there, Your Honor.

With respect to Pennhurst, it is absolutely true that Judge Wilkinson, that the oral argument in the Fourth Circuit hammered away at the Pennhurst case, but a different part of the Pennhurst case. It was a part of the Pennhurst case, Your Honor, that had nothing to do with the pendent jurisdiction argument that it set forth later in its opinion.

In terms of Alden vs. Maine, true, the Supreme Court made a federalism holding, but the Court of Appeals recently in the Robinson case referring to Alden said, "The Alden case made it clear that the FLSA could not constitutionally authorize an action such as the one here involved. At the same time, however, the Supreme Court made it clear in Alden that state law could authorize such actions."

With respect is to the analogy that Mr. Stief, my brother counsel attributed to me about making an argument that if I brought a claim in U.S. District Court and the Court of Federal Claims had exclusive jurisdiction, with all respect, I didn't make that argument. It is a different situation, but it's not one that's -- it's just a different situation. It doesn't have anything to do with this one.

In terms of piecemeal litigation, it is true, Your Honor, I am not disagreeing as a legal matter with the cases about

res judicata. They do prohibit piecemeal litigation, but there are corollaries to that rule. Under one of those corollaries, it clearly sets forth in the restatement and it says, when that court did not have jurisdiction, there is no res judicata effect.

Thank you, Your Honor.

THE COURT: Thank you. Grant all of Defendants' motions for summary judgment finding no dispute as to the material fact that sovereign immunity applies, and on that finding, grant judgment as a matter of law.

I further find based on the Fourth Circuit's opinion in-between these same individuals, that the doctrine of res judicata as expanded under Alvey and Mackall applies. And, consequently, Count III of the amended complaint, the claim under the Maryland Declaration of Rights, is barred both on sovereign immunity and res judicata as expanded to claims not only that were brought, but claims that could have been brought under Alvey and Mackall.

Thank you, gentlemen.

MR. STIEF: Thank you, Your Honor.

MR. EVELIUS: Thank you, Your Honor.

(Whereupon, counsel exited the courtroom.)

THE COURT: This is an amendment after the oral opinion to state it wasn't a motion for summary judgment pending. It was a motion to dismiss pending, and that is what I granted.

No. 00-2103, No. 00-2104, No. 00-2126

UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

CHRISTOPHER T. LIZZI,
Plaintiff-Appellee,

v.

ROBERT ALEXANDER; CHARLES THOMAS;
PHILLIP WALLACE; ANTHONY JOHNSON;
AL MCCOY; DENNISE KURTZ,
Defendants-Appellants,

And

WASHINGTON METROPOLITAN AREA TRANSIT
AUTHORITY; JACK BYRD; MICHAEL KURTZ,
Defendants.

UNITED STATES OF AMERICA,
Movant.

CHRISTOPHER T. LIZZI,
Plaintiff-Appellant,

v.

ROBERT ALEXANDER; CHARLES THOMAS;
PHILLIP WALLACE; ANTHONY JOHNSON;
AL MCCOY; DENNISE KURTZ; WASHINGTON
METROPOLITAN AREA TRANSIT AUTHORITY;
JACK BYRD,

Defendants-Appellees,

and

MICHAEL KURTZ,
Defendant.

UNITED STATES OF AMERICA,
Movant.

CHRISTOPHER T. LIZZI,
Plaintiff-Appellee,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ,
Defendants-Appellants,

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD; MICHAEL KURTZ,
Defendants.

UNITED STATES OF AMERICA,
Movant.

April 4, 2001, Argued
June 20, 2001, Decided

COUNSEL: ARGUED: Gerard J. Stief, Associate General Counsel, WASHINGTON METROPOLITAN

AREA TRANSIT AUTHORITY, Washington, D.C., for Appellants.

Paul Francis Evelius, WRIGHT, CONSTABLE & SKEEN, L.L.P., Baltimore, Maryland, for Appellee.

ON BRIEF: Cheryl C. Burke, General Counsel, Robert J. Kniaz, Deputy General Counsel, Sonia A. Bacchus, Assistant General Counsel, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellants.

JUDGES: Before WILKINSON, Chief Judge, and LUTTIG and GREGORY, Circuit Judges. Chief Judge Wilkinson wrote the opinion, in which Judge Luttig and Judge Gregory joined.

OPINION BY: WILKINSON

OPINION:

WILKINSON, Chief Judge:

In this case, we must decide whether the Eleventh Amendment shields the Washington Metropolitan Area Transit Authority (WMATA), an agency created by interstate compact, from plaintiff Christopher Lizzi's assertions that the agency violated the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. (1994). We also must decide the related question of whether sovereign immunity bars Lizzi's allegation that several individual employees of WMATA violated the FMLA and are thus subject to personal liability for the alleged damages. The district court held that the Eleventh Amendment bars Lizzi's claims against

WMATA, but that the FMLA permits Lizzi to bring an action against the employees of WMATA in their individual capacities. Because sovereign immunity extends to WMATA, and because the claims against the WMATA employees are in reality claims against the agency itself, we affirm in part, reverse in part, and remand with directions to dismiss the action.

I.

A.

Plaintiff Christopher Lizzi worked as a bus wheelchair lift mechanic for WMATA until September, 1997. WMATA fired Lizzi for allegedly combining sick days and vacation leave to miss work for the entire summer. WMATA maintained that Lizzi fabricated his sick leave and did not submit to a medical exam, as required by the agency's policies. Lizzi contested this, and filed suit under the FMLA alleging that WMATA terminated him in violation of the Act.

Lizzi sued WMATA as well as seven individual supervisors at WMATA. The complaint stated that "Plaintiff Christopher T. Lizzi sues defendants Washington Metropolitan Area Transit Authority, Robert Alexander, Charles Thomas, Anthony Johnson, Michael Kurtz, Phillip Wallace, Al McCoy, and Jack Byrd." The complaint further declared that the individual defendants "have, at all relevant times, been employees of WMATA." The complaint also noted the supervisory positions of some of these defendants. McCoy and Byrd were Garage Shift Supervisors; Johnson oversaw the Garage Shift Supervisors; Alexander was WMATA's Absenteeism Supervisor; and Kurtz was WMATA's Bus

Maintenance Superintendent. The complaint did not specify the positions of either Thomas or Wallace. Lizzi asked for, inter alia, reinstatement, back pay, damages, and an order prohibiting the defendants from violating the FMLA.

The district court granted summary judgment for WMATA on Eleventh Amendment grounds, but kept the individual defendants in the case. The lower court held that the WMATA compact does not waive the agency's Eleventh Amendment immunity, and that the FMLA is not a valid exercise of Congress' Fourteenth Amendment, § 5 power. But the court also held that the FMLA specifically defines "employer" to include supervisors, and thus the plain language of the FMLA authorizes suits against the individual employees in their individual capacities. The district court certified for interlocutory appeal the issues of WMATA's waiver of immunity and the liability of the individual defendants under the FMLA. WMATA appeals the decision to keep the individual supervisors in the case, and Lizzi cross-appeals the district court's decision that the compact does not waive WMATA's sovereign immunity.

B.

WMATA is an interstate compact agency and instrumentality of Maryland, Virginia, and the District of Columbia. Its purpose is to ensure the proper functioning and operation of a mass transit system in the Washington, D.C. metropolitan area. See Morris v. WMATA, 251 U.S. App. D.C. 42, 781 F.2d 218, 219 (D.C. Cir. 1986). WMATA receives approximately 44% of its budget from the signatory states. The WMATA compact was approved by Congress in 1966. See Washington Metropolitan Area

Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966).

Three sections of the compact are at the heart of this case. First, § 12 states that WMATA may "sue and be sued." Id. at 1328. Second, § 80 declares that WMATA shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent [sic] committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occur ring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this title shall be construed as a waiver by the District of Columbia, Maryland, Virginia, and the counties and cities within the zone of any immunity from suit. Id. at 1350. Third, § 81 says in pertinent part:

The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [WMATA] and to enforce subpoenas issued under [this compact]. Any such action initiated in a State Court shall be removable to the appropriate United States District Court.

Id.

II.

A.

We note at the outset that WMATA possesses Eleventh Amendment immunity. The signatories of the compact intended to confer Eleventh Amendment immunity on WMATA. See Delon Hampton & Assoc. v. WMATA, 943 F.2d 355, 359 (4th Cir. 1991). Further, both this circuit and the D.C. Circuit have held that Eleventh Amendment immunity may attach to WMATA's actions. See id. at 359; Morris, 781 F.2d at 220. WMATA is a state agency, subject to all the benefits and liabilities of a state itself, including sovereign immunity. See Morris, 781 F.2d at 219-20. It does not matter that WMATA was created by interstate compact, as opposed to being an agency of one state alone. See Delon Hampton, 943 F.2d at 359; Jones v. WMATA, 340 U.S. App. D.C. 320, 205 F.3d 428, 432 (D.C. Cir. 2000).

In Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994), the Supreme Court held that the Port Authority Trans-Hudson, an interstate compact entity, could not claim sovereign immunity. See Hess, 513 U.S. at 52-53. But the Court in Hess relied heavily on the fact that the Port Authority did not receive any funding from any state. Instead, it was a "self-sustaining" agency. Id. at 50. Indeed, the Court in Hess specifically distinguished the Port Authority from WMATA because WMATA was not self-sufficient. Id. at 49-50. Thus, the conferral of Eleventh Amendment immunity on WMATA "is compatible" with the holding in Hess. Id. at 50 n.20.

B.

Lizzi argues that under Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 109 L. Ed. 2d 264, 110 S. Ct. 1868 (1990), §§ 12 and 81 of the WMATA Compact read together effect a waiver of the agency's Eleventh Amendment immunity.

In Feeney, the Supreme Court ruled that an interstate compact entity, the Port Authority Trans-Hudson, had given its consent to suit in federal court. See 495 U.S. at 308-09. The statutory consent to suit provision in Feeney proclaimed that the states gave "consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . . against the Port of New York Authority." Id. at 306 (internal quotations omitted) (alteration in original). This provision standing alone, although "broadly framed," may have reflected "only a State's consent to suit in its own courts." Id. The Court thus looked at the venue provision of the compact, which stated that venue "shall be laid within a county or judicial district, established by one of said States or by the United States. . . ." Id. at 307 (internal quotations omitted). Since the venue provision explicitly referred to federal courts, the Court held that the statutory consent to suit provision must encompass both federal and state courts. See id. at 307-09.

Lizzi argues that the similar provisions in the WMATA compact also effect a waiver of Eleventh Amendment immunity. Section 12 states that WMATA may "sue and be sued." 80 Stat. at 1328. And § 81 makes clear that venue is proper in federal court. Thus, Lizzi maintains that under the reasoning of Feeney, WMATA must have waived its Eleventh Amendment immunity.

We disagree. Even were we to assume that WMATA's consent to suit provision is coextensive with the broader consent to suit provision in Feeney, Lizzi's argument has one fatal flaw: § 80 of the WMATA compact "specifically and expressly delineates the scope of WMATA's consent to be sued." Morris, 781 F.2d at 222 n.3. Feeney is not applicable here because it did not confront the situation in this case -- a compact containing another clause specifically addressing the extent to which an agency waives its sovereign immunity. Morris involved a suit brought by an officer contending that WMATA discriminatorily discharged him. The Morris court disallowed the plaintiff's suit, even though the case arose under federal law, because § 80 did not waive WMATA's Eleventh Amendment immunity. See id. at 219-21. Since Morris, the District of Columbia Circuit has consistently held that the WMATA compact does not waive the agency's Eleventh Amendment immunity. See, e.g., Jones, 205 F.3d at 432 (suit brought under the ADEA dismissed due to WMATA's Eleventh Amendment immunity); Beebe v. WMATA, 327 U.S. App. D.C. 171, 129 F.3d 1283, 1285-86 (D.C. Cir. 1997) (suit alleging, inter alia, constructive discharge dismissed due to WMATA's sovereign immunity); Souders v. WMATA, 310 U.S. App. D.C. 370, 48 F.3d 546, 551 (D.C. Cir. 1995) (nuisance suit dismissed due to WMATA's Eleventh Amendment immunity); Sanders v. WMATA, 260 U.S. App. D.C. 359, 819 F.2d 1151, 1153-56 (D.C. Cir. 1987) (suit alleging negligent termination and violation of federal statute dismissed due to WMATA's sovereign immunity).

Lizzi argues in response to this multitude of cases that the D.C. Circuit is wrong, and that § 80 is applicable only to claims arising under state law. We agree with the Morris line of cases, however. Any waiver of Eleventh

Amendment immunity must be clear and unequivocal. See Edelman v. Jordan, 415 U.S. 651, 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). The text of § 80 indicates that the WMATA compact provides only for a limited waiver of sovereign immunity. The compact explicitly waives WMATA's sovereign immunity for breaches of contract and for torts "committed in the conduct of any proprietary function." 80 Stat. at 1350. There is no contention that the exercise of authority at issue in this suit was in any sense a tort or a contract "committed in the conduct of any proprietary function." Rather, hiring, training, and supervision practices are governmental functions. See Beebe, 129 F.3d at 1287. This case therefore does not fit within the scope of WMATA's limited waiver of sovereign immunity.

The compact evinces an intent that the agency does not waive its immunity in all other cases. It is thus unavailing to argue that §§ 12 and 81 effected a broad waiver of Eleventh Amendment immunity when § 80 makes so clear the limited nature of any such waiver. Reliance solely upon the sue and be sued clause and the venue clause, as Lizzi urges us to do, "would be particularly inappropriate" in this case because "another section of the Compact, § 80," delineates the entire scope of WMATA's waiver of its sovereign immunity. Morris, 781 F.2d at 222 n.3. Lizzi cannot use the combination of §§ 12 and 81 to create a waiver that § 80 itself does not provide. Indeed, "it is a commonplace of statutory construction that the specific governs the general." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992). Finally, we agree with the D.C. Circuit that nothing in the WMATA compact purports to waive the agency's Eleventh Amendment immunity in all cases under federal law. See Jones, 205 F.3d at 430; Morris, 781

F.2d at 221. Our reading of the compact is not only faithful to its language; it also renders circuit law consistent in the two federal circuits most likely to hear cases in which WMATA is a party.

C.

The only remaining reason why WMATA would be subject to suit is if the FMLA validly abrogates the agency's Eleventh Amendment immunity. The district court ruled that the FMLA did not abrogate WMATA's Eleventh Amendment immunity. We agree.

The Supreme Court has enunciated a two-part test for determining whether an act of Congress abrogates a state's Eleventh Amendment immunity. First, Congress must unequivocally declare an intent to abrogate. Second, Congress must act pursuant to a valid exercise of its power. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996). We assume for purposes of this decision that Congress has declared its unequivocal intent to abrogate. The FMLA states that an action may be maintained "against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . ." 29 U.S.C. § 2617(a)(2). Cf. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73-74, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000) (holding that identical language in the Age Discrimination in Employment Act constitutes an unmistakably clear attempt by Congress to abrogate a state's Eleventh Amendment immunity).

Congress must also have the proper constitutional authority to abrogate, however. Since Seminole Tribe, the Court has made clear that Congress cannot abrogate Eleventh Amendment immunity using its Article I

powers. See, e.g., Board of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 962, 148 L. Ed. 2d 866 (2001) ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); id. (collecting cases since Seminole Tribe); see also South Carolina State Ports Auth. v. Federal Mar. Comm'n, 243 F.3d 165, 168 (4th Cir. 2001). Only under its Fourteenth Amendment, § 5 power can Congress validly abrogate a state's immunity from private suit. See Garrett, 121 S. Ct. at 962; South Carolina Ports, 243 F.3d at 177.

Legislation properly enacted under § 5 must be congruent and proportional to the Fourteenth Amendment injury being remedied. City of Boerne v. Flores, 521 U.S. 507, 520, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997); Kimel, 528 U.S. at 81; Garrett, 121 S. Ct. at 963. The Supreme Court has held that both the Age Discrimination in Employment Act and the Americans With Disabilities Act were not validly enacted under Congress' § 5 power because "the remedy imposed by Congress" was not "congruent and proportional to the targeted violation." Garrett, 121 S. Ct. at 967-68 (ADA); accord Kimel, 528 U.S. at 82-83 (ADEA).

Thus, the issue here is whether the FMLA is congruent and proportional to the identified Fourteenth Amendment violation -- employment discrimination on the basis of sex. The statute identifies gender discrimination as the constitutional harm to be remedied by the FMLA. The FMLA states that its purpose is to "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral basis" and in a manner

"consistent with the Equal Protection Clause of the Fourteenth Amendment." 29 U.S.C. § 2601(b)(4); see also Chittister v. Department of Cmty. and Econ. Dev., 226 F.3d 223, 228 (3d Cir. 2000). In making this finding of purpose, Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care. See Garrett, 121 S. Ct. at 964-65. As the Third Circuit has stated, "Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause." Chittister, 226 F.3d at 228-29.

Moreover, the FMLA is simply not narrowly tailored to redress the asserted Fourteenth Amendment harm of gender discrimination. While Congress has broad latitude to act, it does not have the constitutional power to pass such a sweeping statute on the basis of the purported Fourteenth Amendment violation. The difficulty is that the FMLA bestows on private parties a broad-ranging substantive entitlement to sue states for a range of personnel practices without any finding that the states were culpable of an Equal Protection violation to begin with. That the FMLA sweeps far beyond the redress of gender discrimination is evident in the breadth of the entitlement to subject a state to suit. Instead of attempting to remedy the identified violation, Congress attempted to redefine the right. As the district court noted, the FMLA "exceeds Congress's power under the Fourteenth Amendment by attempting to define specifically what equal protection means rather than merely remedy an existing constitutional violation."

The FMLA "does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to sick leave." Chittister, 226 F.3d at 229. The Act imposes on the states a federally devised standard entitling employees to "12 workweeks of leave during any 12-month period." 29 U.S.C. § 2612(a)(1). The Act also allows any person to subject a state to private suit for violating the statute. Id. § 2617(a)(2). The Fourteenth Amendment does not allow Congress to prescribe a privately enforceable guarantee to all state employees of at least twelve weeks of leave per year. See, e.g., Chittister, 226 F.3d at 228-29; Garrett v. University of Ala. at Birmingham Bd. of Tr., 193 F.3d 1214, 1219 (11th Cir. 1999), rev'd on other grounds, 121 S. Ct. at 968.

In sum, the substantive requirements of the FMLA are "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" Kimel, 528 U.S. at 82 (quoting City of Boerne, 521 U.S. at 532). Indeed, every circuit to examine this issue has identified this fundamental lack of proportionality as a main reason why the FMLA is not a valid abrogation of a state's Eleventh Amendment immunity from suit. See, e.g., Townsel v. Missouri, 233 F.3d 1094, 1095 (8th Cir. 2000); Chittister, 226 F.3d at 229 (legislative scheme not "tailored to preventing any [constitutional] harm"); Kazmier v. Widmann, 225 F.3d 519, 526 (5th Cir. 2000) ("Broad, prophylactic legislation must be congruent with and proportional to actual, identified constitutional violations by the States."); Sims v. University of Cincinnati, 219 F.3d 559, 566 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61, 69 (2d Cir. 2000) ("There is no evidence that this conferment of federally protected

leave is tailored to remedy sex-based employment discrimination."); Garrett, 193 F.3d at 1219. We agree with all of our sister circuits. The FMLA does not validly abrogate a state's Eleventh Amendment immunity from suit.

III.

WMATA and the individual defendants appeal the district court's determination that the FMLA allows suits against individual supervisors in their individual capacities. In support of this result, the district court pointed to the fact that the FMLA's definition of "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(I). WMATA argues preliminarily, however, that the individual defendants in essence have been sued for damages in their official capacities rather than their individual capacities. fn1 "Only States and state officers acting in their official capacity are immune from suits for damages in federal court." Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855, 2001 U.S. LEXIS 4117, *19 n.10 (2001) (citing Edelman v. Jordan, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)). The Supreme Court has declared that the "Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) (quoting Ford Motor Co. v. Department of Treas. of Ind., 323 U.S. 459, 464, 89 L. Ed. 389, 65 S. Ct. 347 (1945)). The Supreme Court has also made clear that a suit for damages against individual officers in their official

capacities is treated like a suit against the state itself. See, e.g., Pennhurst, 465 U.S. at 101; Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261, 270, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997). Thus, if Lizzi has sued the individual supervisors in their official capacities, the employees would be entitled to the same Eleventh Amendment immunity that WMATA itself retains.

Here, Lizzi's complaint makes clear that the state is the real party in interest. Lizzi's complaint named seven individuals as well as WMATA. The complaint, however, never stated whether the individuals were being sued in their official or individual capacities. Moreover, the allegations in the complaint recounted how WMATA as an agency decided to fire Lizzi. Any actions of the individual defendants were tied inextricably to their official duties. For example, the complaint recounted that "WMATA told [Lizzi]" that he was under investigation after "defendant Alexander, WMATA's Absenteeism Supervisor, recommended in writing to defendant Kurtz, WMATA's Bus Maintenance Superintendent, that plaintiff be terminated." The complaint made no showing of any ultra vires action taken by any individual employee. And a conclusory allegation that the "defendants" were motivated by "spite" and "ill will" is not enough, standing alone, to maintain an FMLA action against these supervisors in their individual capacities.

Indeed, even if Lizzi had actually used the phrase "individual capacity," his complaint could not stand. In Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1985), the Supreme Court emphasized that the mere incantation of the term "individual capacity" is not enough to transform an official capacity action into an individual capacity action. See 475

U.S. at 543. Here, Lizzi's complaint is weaker than Bender's because the complaint does not even state that the defendants are being sued in their individual capacities. Rather, the complaint used the defendants' work address as the address of record and spoke of the individual defendants by name only passingly and in relation to the jobs that they performed at WMATA. The other court to examine the individual-capacity question with regard to FMLA suits against state employees had no difficulty in holding that the real party in interest in these lawsuits is the state, not the individual defendants. See Kazmier, 225 F.3d at 533 n.65.

Lizzi argues, however, that Hafer v. Melo, 502 U.S. 21, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991), requires that the claims against the individual supervisors should be treated as an individual-capacity suit. In Hafer, the Court held that 42 U.S.C. § 1983 permits individual capacity suits against state officers for damages arising from official acts. See Hafer, 502 U.S. at 23. We think, however, that Hafer is inapposite. Hafer was based on "the broad language of § 1983." Id. at 28. Unlike § 1983, the FMLA is not focused against those who carry the "badge of authority of a State." Hafer, 502 U.S. at 28 (internal quotations omitted). Whereas § 1983 is intended as a broad enforcement vehicle to bring suit against state officials for violations of all other federal statutory and constitutional rights, the FMLA is focused on creating a set of statutory entitlements in its own right. See, e.g., 29 U.S.C. § 2612(a). Moreover, the text of the FMLA does not contain the well established system of immunities which § 1983 defendants can assert. fn2

Other considerations militate against interpreting the FMLA to hold individual state employees personally

liable for official acts. To hold that individual supervisors, as "employers," may be sued under the statute while also holding that the Constitution prohibits the state itself from being sued would undermine the Supreme Court's decisions in Garrett, Kimel, and Seminole Tribe. Plaintiffs like Lizzi would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer. We refuse to create such an anomaly. The state would still suffer the indignity of having each discrete decision regarding personnel or organizational matters subject to second-guessing by a federal court. "The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings." Coeur d' Alene, 521 U.S. at 270.

A rule permitting such individual liability would do nothing more than "adhere to an empty formalism and [would] undermine the principle, reaffirmed . . . in Seminole Tribe, that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction." Id. Because WMATA enjoys Eleventh Amendment immunity for claims brought under the FMLA, the individual supervisors under the FMLA are protected by that same immunity. See Beebe, 129 F.3d at 1288-89 (individual supervisors of WMATA have immunity for alleged wrongful termination of employee). WMATA's Eleventh Amendment immunity transfers to the supervisors because the individuals were sued in their official capacities for their official acts.

IV.

The WMATA compact does not waive the agency's Eleventh Amendment immunity from suit. And the

FMLA does not validly abrogate a state's Eleventh Amendment immunity. Consequently, Lizzi's claims against WMATA must be dismissed for lack of subject matter jurisdiction. Similarly, Lizzi's claims against the individual supervisors at WMATA must be dismissed as well because these claims were in reality an action against the agency itself. The FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state. For the foregoing reasons, the judgment of the district court is affirmed in part, reversed in part, and remanded with directions to dismiss it.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Footnotes

fn1 In view of our resolution of this issue, we do not address the question of whether, in an action against a private employer, an individual supervisor is subject to personal liability for violating the FMLA.

fn2 The issue of whether the FMLA's remedial scheme is so comprehensive that it preempts the use of § 1983 actions is of course not before us. See, e.g., Blessing v. Freestone, 520 U.S. 329, 341, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997) (Congress may forbid recourse to § 1983 by, inter alia, "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."); Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 419 (M.D. Pa. 1999) (The FMLA provides "comprehensive remedial measures that evinces Congress' intent to foreclose the use of a § 1983 action.").

No. 32
September Term, 2004

IN THE COURT OF APPEALS
OF MARYLAND

CHRISTOPHER T. LIZZI

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, ET AL.

ORDER

The Court having considered the Petitioner's Motion for Reconsideration filed in the above-captioned, it is this 11th day of January, 2005,

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, DENIED.

/s/ ROBERT M. BELL
Chief Judge